
MULLA HINDU LAW

Nineteenth Edition

2

S A Desai

 LexisNexis®
Butterworths

MULLA
PRINCIPLES OF HINDU LAW

MULLA PRINCIPLES OF HINDU LAW

Nineteenth Edition

SA Desai

B Com, LLB,
Advocate, High Court, Gujarat

Vol-II

LIBRARY
NATIONAL LAW SCHOOL OF
INDIA UNIVERSITY
NAGARBHAVI, POST BAG NO. 7201
BANGALORE - 560 072.



LexisNexis®

Butterworths

For **Editorial Questions** concerning this publication, please contact:

Tel: 011-23739614/15/16, 23326454/55

Email: editorial@lexisnexis.co.in

For **Customer Assistance**, please contact:

Tel: 011-23739614/15/16, 23326454/55

Email: customer.care@lexisnexis.co.in

Fax: 011-23326456

You can also visit us at:

LexisNexis,
14th Floor, Vijaya Building,
17 Barakhamba Road,
New Delhi-110001.

© LexisNexis (A Division of Reed Elsevier India Pvt Ltd) 2005

© In general Introduction and Commentaries on four Acts—SA Desai

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of this publication is stored in a retrieval system of any nature.

Mulla, *Principles of Hindu Law*, Vol II, 19th edn (ed SA Desai), LexisNexis Butterworths (A division of Reed Elsevier Pvt Ltd), New Delhi, India.

First published in 1912.

ISBN : 81-8038-111-0

Typeset by Excel Publishing Services, 62/1 Laxmi Market, Munirka, New Delhi-110067.

Printed by Sirohi Bros Pvt Ltd, E-121, Sector - VII, Noida-201301.

Purchased : *mn*
Approval : *021238*
G : *1350*
A : *1350*
P : *1350*
National Law School of
India University Library

Editorial Manager

Arun Bhanot

Assistant Editorial Manager

Pankhuri Shrivastava

Legal Editors

Mini N Nair, Sheeba Bhatnagar

The publisher has taken all care and effort to ensure that the legislative provisions reproduced here are accurate and up to date. However, the publisher takes no responsibility for any inaccuracy or omission contained herein or for advice, action or inaction based hereupon. Reference must be made to the Official Gazette issued by the Government of India for the authoritative text of any Act, Rule, Regulation, Notification or Order.

TABLE OF CONTENTS

<i>Table of Contents</i>	<i>v</i>
<i>Table of Cases</i>	<i>xxvii</i>

The Hindu Marriage Act 1955

Introductory Note

Marriage, a sacrament	1
Need for codification	2
Divorce, a thorny question	3
Wide and extensive application of the Act	4
Special Marriage Act 1954	5
Ceremonial marriage: 'Hindu marriage'	5
Marriage Laws (Amendment) Act 68 of 1976	5
Conditions for a valid marriage	5
Ceremonial requirements	6
Conception of Hindu Marriage under the Act	6
Marriage void ipso jure	7
Voidable Marriage	8
Distinction between void and voidable marriage	8
Marriage Laws (Amendment) Act 68 of 1976	9
Divorce	9
Decree for judicial separation instead of divorce	10
Divorce by mutual consent	10
Judicial separation	10
Distinction between divorce and judicial separation	10
Scheme of the Act in respect of the above reliefs	11
Changes in law brought about by the Act	11
Decision of courts in England	12
Duty of the court	13
Irretrievable Estrangement	14

The Hindu Marriage Act 1955

Preamble	15
Codifying Act	15
Decisions of courts in England	17
Rules of interpretation of statutes	17
Reference to previous law	21
Headings	21
Marginal notes	22
Recent enactments	22

CHAPTER I

Preliminary

1. Short title and extent	22
Commencement and extent	22
'Domiciled'	23
2. Application of Act	24
Persons governed by the Act	25
Sub-section (1)(a): Hindu	25
Sub-section (1)(b)	26
Sub-section (1)(c)	26
Domiciled	26
Explanation (b)	26
Explanation (c)	27
Sub-section (2): Scheduled Tribes	27
Sub-section (3)	28
3. Definitions	28
'Unless the context otherwise requires'	29
Clause (a) 'Custom': 'usage'	29
Clause (b): 'District Court'	30
Clause (c) and (d): 'Full blood: Half blood: Uterine blood'	30
Clause (e): 'prescribed'	31
Clause (f): 'Sapinda relationship'	31
Explanation	37
Clause (g): 'Degrees of prohibited relationship'	38
Explanation	39
4. Overriding effect of the Act	39
Overriding effect of the Act	40
'Save as otherwise expressly provided in this Act'	41

Act is not retrospective in its operation	41
Constitutional guarantees	42

CHAPTER II

Hindu Marriages

5. Conditions for a Hindu marriage	42
Amendments	43
Conception of a Hindu marriage under the Act	44
Solemnisation of Hindu marriage	45
Clause (i): Monogamy	46
Clause (ii): Mental Capacity	48
Clause (iii): Age of the parties: Consent	48
Clause (iv): Degrees of prohibited relationship	49
Clause (v): Sapinda relationship	50
Clause (vi): Consent of guardian of minor bride	50
6. Guardianship in marriage	51
Amendment	51
Guardianship in marriage	52
Persons who may act as guardians in marriage	53
Marriage without consent of guardian	53
7. Ceremonies for a Hindu marriage	53
Ceremonies for a Hindu marriage	53
Presumption as to marriage and legitimacy	55
Factum valet	56
Madras Act 21 of 1967	56
8. Registration of Hindu marriages	57
Registration of marriage	57
Consequences of non-registration and penalty for failure to register	58
Grant of copies	59

CHAPTER III

Restitution of Conjugal Rights and Judicial Separation

9. Restitution of conjugal rights	59
Amendment	59
Restitution of conjugal rights	59
Basis of the rule and importance of a decree for restitution	60

Petition to the district court	61
Restitution when decreed and when refused	61
Burden of proof	63
'Reasonable excuse' or 'just cause'	63
Correspondence	65
Delay	66
Separation by mutual consent	66
Consent Decree	67
Mode of execution of decree	67
Pending proceedings are governed by the section	67
10. Judicial Separation	68
Amendment	68
Pending petitions and proceedings	69
Judicial separation	69
Sub-section (1)	70
Amended and unamended provisions relating to judicial separation	71
Sub-section (2): Rescission of decree	72
Consent Decree	72

CHAPTER IV

Nullity of Marriage and Divorce

11. Void Marriages	72
Marriage void ipso jure	72
Declaratory suit under Civil Procedure Code	74
Decree of nullity	74
'On a petition presented by either party thereto, against the other party'	76
Remarriage before disposal of appeal against decree of nullity	76
12. Voidable Marriages	76
Amendments	77
Voidable marriage	77
Clause (a): Impotence	78
Consummation: Meaning of	79
Incapacity to consummate	79
Incapacity quoad the particular individual	82
Willful refusal of the respondent to consummate marriage	82
Delay in instituting proceedings	83
Doctrines of 'Insincerity': 'Approbation'	83

Clause (b): Marriage with a person of unsound mind or one suffering from mental disorder—Section 5(ii)	84
Amendment	84
Burden of proof	84
Clause (c): Consent obtained by force or fraud	85
Force	85
Fraud	86
Pleading	87
Condonation	87
Clause (d)—Respondent wife pregnant at the time of marriage	87
Blood test	89
Sub-section (2)(a)(ii)	89
Sub-section (2)(b)(ii)	89
Remarriage before disposal of appeal against decree of nullity	89
13. Divorce	90
Amendments	92
Uttar Pradesh Act 1962 (13 of 1962)	93
Grounds for divorce and judicial separation	93
Alternate relief in divorce proceedings	94
Pending petitions and proceedings	94
Liberal construction	94
Divorce	96
Clause (i): Adultery	97
Long period of gestation: Non-access	99
Blood-test	100
Confession of adultery	100
Ground also for judicial separation	102
Onus and standard of proof	102
Condonation of adultery	103
Clause (i) prior to amendment	103
Clause (ia): Cruelty	104
Mental cruelty	109
Some broad general principles	110
Intention	112
Clause (ia) ‘...treated...with cruelty’	113
Dowry	120
Justification and excuse	120
Insanity	121
Schizophrenia: Serious diseases	121
Proof: Sufficiency of evidence: Corroboration	122
Delay	122
Condonation	122
Clause (ib): Desertion: Separation: Animus deserendi	123

Separation	127
Consensual separation	127
'Continuous period of not less than two years...'	128
'Wilful neglect'	130
Constructive desertion	130
Mutual desertion	133
Good cause for separation	133
Termination of desertion	135
Offer of reconciliation	136
Desertion and cruelty	138
Onus and standard of proof	138
Delay	140
Clause (ii): 'Ceased to be a Hindu by conversion'	140
Clause (iii): '...incurably of unsound mind or suffering... mental disorder...'	141
'Unsound mind'	141
Minor	143
'Mental disorder'	143
'...continuously or intermittently...'	144
Grounds also for judicial separation	144
Clause (iv): Incurable and virulent leprosy	145
Clause (v): Venereal disease	145
Judicial separation	146
Clause (vi): Adoption of religious order	146
Clause (vii): 'has not been heard of as been alive for a period of seven years...'	147
Sub-section (1A)(i): Where there has been no resumption of cohabitation for one year or more after decree for judicial separation	148
'For a period of...or upwards after the... decree'	150
Sub-section (1A)(ii): Where there has been restitution of conjugal rights	150
Sub-section (2): Husband having more than one wife alive: Marriages solemnised before commencement of the Act	154
Bigamous marriage	155
Sub-section (2)(ii)	155
Sub-section (2)(iii)	156
Sub-section (2)(iv)	156
Recognition to divorce decrees of foreign courts	156
Remarriage after decree for dissolution of marriage	157
Transfer of cases	158
13A. Alternate relief in divorce proceedings	159
Alternate relief: Judicial separation instead of divorce	159

Table of Contents

13B. Divorce by mutual consent	160
Divorce by mutual consent	160
Petition by both the parties together	161
'...have been living separately'	162
'...not been able to live together'	162
Lawful compromise may be recorded	163
'Subject to the provisions of the Act'	163
14. No petition for divorce to be presented within one year of marriage	164
No petition for divorce within one year of marriage	165
Proviso to sub-section (1)	165
Proviso	166
'...court may allow a petition to be presented before one year'	166
'Exceptional hardship' or 'exceptional depravity'	167
Contested application for leave	168
Discretion of the court	169
Remarriage after decree for dissolution of marriage	169
Section applies only to a petition for divorce	169
15. Divorced persons when may marry again	169
Amendment	170
When divorced persons may marry again	170
Remarriage before disposal of appeal against decree for dissolution of marriage	171
Deleted Proviso	171
Remarriage before disposal of appeal against decree of nullity under sections 11 and 12	172
16. Legitimacy of children of void and voidable marriages	173
Legitimacy of children of void or voidable marriage	174
Sub-section (1)	174
Sub-section (2)	175
Amendments	176
Sub-section (3)	177
17. Punishment for bigamy	179
'Solemnised': Proof of solemnisation	179
Injunction	181
Venue of trial	181
18. Punishment for contravention of certain other conditions for a Hindu marriage	181
Amendment	182

CHAPTER V

Jurisdiction and Procedure

19. Court to which petition shall be presented	182
Amendment	182
‘Petition’	183
Jurisdiction	183
...‘resides’... ‘resided’	184
Denial of marriage	186
District Court	187
20. Contents and verification of petitions	188
Amendment	188
‘Statements...in petition...may be referred to as evidence’	189
21. Application of Act 5 of 1908	189
Procedure regulated by The Code of civil procedure 1908 and High Court Rules	189
Pleading amendment	190
‘Decree’: Section 2(2), Code of civil procedure 1908	191
Inherent powers of court: Stay of proceedings	191
Effect of stay of substantive proceedings on orders of interim maintenance	191
Provisions of the Act touching matters of procedure	192
Appeal	192
Co-respondent	193
Intervention: Power of court to allow intervention on terms	193
Damages	194
Res judicata	194
Costs	196
21A. Power to transfer petitions in certain cases	197
21B. Special provision relating to trial and disposal of petitions under the Act	198
21C. Documentary evidence	198
22. Proceedings to be in camera and may not be printed or published	198
Amendment	199
Hearing in camera	199
Restriction on publication and newspaper reports	199
23. Decree in Proceedings	200
Amendment	201
Power and duty of the court	202

Table of Contents

Standard of proof: Corroboration	203
Admissions	206
No decree merely by consent of parties	206
'...whether defended or not'	208
Discretion of the court: '...then, and in such a case, but not otherwise, the court shall decree such relief accordingly'	208
Clause (a): '...taking advantage of his or her own wrong or disability...'	210
Connivance	212
Condonation	214
Knowledge of the matrimonial offence	217
Continuance or resumption of sexual intercourse	217
Forgiveness is conditional but condonation is not a contingent contract	218
Revival of matrimonial offence	219
Condonation in case of grounds of offences other than adultery or cruelty	221
Standard of proof	221
Collusion	222
Delay	223
Delay and proceeding on ground of desertion	226
Delay and proceeding for nullity on grounds of impotence	226
Clause (e)...legal ground why relief should not be granted.....	227
Sub-section (2): Reconciliation	227
Proviso	228
Sub-section (3)	228
23A. Relief for respondent in divorce and other proceedings	229
24. Maintenance pendente lite and expenses of proceedings	230
Maintenance pendente lite	230
Denial of marriage	232
Denial of jurisdiction	232
Defences to suit and jurisdiction	232
Practice	233
Hindu Adoptions and Maintenance Act 1956	233
Criminal Procedure Code	233
Matter ordinarily decided on affidavits	234
'... in any proceeding under this Act'	234
Assessment of quantum: 'having regard to the petitioner's own income and the income of the respondent'	236
'...has no independent income sufficient'	237
Discretion of the court	238
Flouting order of interim maintenance	240

Table of Contents

Interim maintenance for children	240
Application confined to spouses	241
Costs	241
Appeal: Section 28	242
Enforcement of Order: Stay of proceedings if necessary	242
25. Permanent alimony and maintenance	242
Amendment	243
Permanent alimony and maintenance	243
Scope	246
'...court exercising jurisdiction under this Act'	249
'...at the time of passing any decree or at any time subsequent thereto...'	249
'...on application made to it by either the wife or the husband'	253
Order can be made in favour of unsuccessful spouse	253
Discretion	254
Resumption of cohabitation	256
'...gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant'	256
Assessment of quantum: having regard to the income and property of the respondent and the applicant and the conduct of the parties and other circumstances of the case	257
'Conduct of the parties'	261
'...may be secured, if necessary, by a charge...'	262
Agreement not to sue for maintenance	262
Sub-section (2): Variation of order	262
Sub-section (3)	263
Appeal	263
Second Appeal	264
26. Custody of children	264
Custody of children	264
27. Disposal of property	266
28. Appeals from decrees and orders	269
Amendment	269
Appeals	270
Judgment in rem	270
Sub section (1)	270
Sub section (2)	271
Letters Patent Appeal	272
Forum of Appeal	272
Petition, Suit, Decrees	273

Sub-section (4), Limitation	273
Interference by appellate court	274
28A. Enforcement of decrees and orders	275

CHAPTER VI

Savings and Repeals

29. Savings	275
Savings	276
Sub-section (1)	276
Sub-section (2)	277
Sub-section (3)	278
Sub-section (4)	279
30. Repeals	279
Enactments repealed	279

The Hindu Succession Act 1956

Introductory Note

Uniform Law of Succession: Wide Application of the Act	283
Overriding Effect of the Act	284
Scheme of the Act	284
Succession to Property of a Male Intestate	285
Property of a female Hindu to be her absolute property	286
Succession to property of female intestate	286
Mitakshara coparcenary retained in an attenuated form	287
Some general rules	288
Disqualified heirs	289
Recent changes	290

The Hindu Succession Act 1956

Preamble	291
Codifying Act	292
Rules of interpretation of a statute	292

CHAPTER I

Preliminary

1. Short title and extent	292
---------------------------------	-----

Title	292
Extent and commencement	293
2. Application of Act	293
Persons governed by the Act	294
Christians in the State of Pondicherry	295
3. Definitions and interpretations	295
‘Unless the context otherwise requires’	297
‘Agnates’: ‘Cognates’	297
‘Aliyasantana law’: ‘Marumakkattayam law’: ‘Nambudri law’	297
‘Custom’: ‘Usage’	297
‘Full blood; Half blood; Uterine blood’	298
‘Related’: Relationship by adoption	298
‘Related’: Proviso	298
Sub-section (2)	299
4. Overriding effect of Act	299
Overriding effect of the Act	299
Agricultural land	302
The Act is not retrospective in its operation	303

CHAPTER II

Intestate Succession

General

Inheritance never in abeyance	305
Spes successionis	305
5. Act not to apply to certain properties	306
Clause (i)	306
Clauses (ii) and (iii)	307
6. Devolution of interest in coparcenary property	308
Devolution of interest in Mitakshara coparcenary property— after the Amendment of 2005	309
Devolution of interest in Mitakshara coparcenary property	311B
‘...shall devolve by survivorship’	312
Proviso	313
Computation of the Interest of the Deceased coparcener and the interest of his widow	319
Subsequent partition between surviving coparceners	320
Debts of a deceased coparcener	321
Joint family business continued after death of a coparcener	322
Parties to suit relating to any property affected by the proviso	322
Explanation II: Separated member	323

7. Devolution of interest in the property of a tarwad, tavazhi kutumba, kavaru or illom	324
Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru, or illom	325
Sub-section (1)	327
Sub-section (2)	327
Sub-section (3): Devolution of sthanam property	329
8. General rules of succession in the case of males	330
Succession to property of a male dying intestate	331
The four categories of heirs	332
Property	333
'...property of a male Hindu... shall devolve'	334
'...according to the provisions of this Chapter'	335
Sections 8 and 14	335
Sections 8 and 15	335
Relative by adoption	335
Order of Succession	337
9. Order of succession among heirs in the Schedule	357
10. Distribution of property among heirs in Class I of the Schedule	359
Distribution among heirs in Class I of the Schedule	359
11. Distribution of property among heirs in Class II of the Schedule	363
Distribution among heirs in Class II of the Schedule	363
12. Order of succession among agnates and cognates	365
13. Computation of degrees	365
Sections 12–13: Succession among agnates and cognates	365
Rules of Preference	369
14. Property of a female Hindu to be her absolute property	377
Scope and ambit	378
Property of female to be her absolute property	380
Co-widows	380
'Acquired'—meaning of	382
'...Possessed By A Female Hindu, Whether Acquired Before or After the Commencement of this Act'	383
Alienation of Property Made By A Female Before Commencement of the Act	383
'Possessed'—Meaning of	386

Table of Contents

Reversioners	391
Suit by remote reversioner	393
Sections 8 and 14	394
Surrender of estate by widow or other limited heir	394
Reconveyance To the Limited Owner by the alienee of property, alienated by her before the Act came into force	395
‘...as full owner...’	395
Remarriage	396
Explanation	397
Sub-section (2): Restricted estate	397
‘...acquired by way of...’	398
Property given in lieu of maintenance	401
15. General rules of succession in the case of female Hindus	406
Succession to property of a female dying intestate	407
Property	409
Prospective operation: ‘Property of a female Hindu... shall devolve...’	410
Order of succession	410
Special Order of succession in case of childless female intestate in respect of property inherited by her from her father, mother, husband or father-in-law	421
Clause (a): Property inherited from father or mother	422
Clause (b): Property inherited from husband or father-in-law	426
Sections 8, 15 and 16: Heirs of the husband to be ascertained as on date of death of the female Hindu	428
16. Order of succession and manner of distribution among heirs of a female Hindu	429
Rules 1 and 2	429
Rule 3	431
17. Special provisions respecting persons governed by marumakkattayam and aliyasantana laws	432
Succession To the property of a male or female Hindu governed by Marumakkattayam law or Aliyasantana law dying intestate	432
Succession in case of male intestate	433
Succession in case of female intestate	435
Order of succession and manner of distribution among heirs of a female Hindu under section 17 read with section 15 and 16	437

General Provisions Relating to Succession

18. Full-blood preferred to half-blood	439
--	-----

Table of Contents

19. Mode of succession of two or more heirs	442
Tenants-in-common	443
20. Right of child in womb	443
21. Presumption in cases of simultaneous deaths	444
Presumption in cases of simultaneous deaths	445
22. Preferential right to acquire property in certain cases	446
Pre-emption	446
Suit	448
Sub-section (1)	448
Limitation	448
Appeal	449
Sub-section (2)	449
Sub-section (3)	449
23. Special provisions respecting dwelling houses	449
Special provisions respecting dwelling houses	450
‘Surviving... her... heirs specified in Class I of the Schedule’	451
‘Dwelling-house wholly occupied by members of his or her family’	452
‘Until the male heirs choose to divide their respective shares therein’	453
24. Certain widows re-marrying may not inherit as widows	454
Disqualified heirs	455
‘Related to the intestate as the widow of a predeceased son’	455
‘...as such widow’	456
‘...if on the date the succession opens, she has remarried’	456
25. Murderer disqualified	456
Murderer disqualified	456
‘...in furtherance of succession...’	457
Disqualification confined to murderer and those claiming title through the murderer	458
26. Convert’s descendants disqualified	458
Conversion	459
27. Succession when heir disqualified	459
28. Disease, defect, etc. not to disqualify	460
<i>Escheat</i>	
29. Failure of heirs	460
Failure of all heirs—Escheat	460
Andhra Pradesh Amendment	461

Tamil Nadu Amendment	464
Maharashtra Amendment	466

CHAPTER III

Testamentary Succession

30. Testamentary succession	468
Right to dispose off property by will	468
Will by female Hindu	470
Sub-section (2)	470

CHAPTER IV

Repeals

31. Repeals	470
CLASS I	471
CLASS II	471

The Hindu Minority and Guardianship Act 1956

Introductory Note

Indian Majority Act 1875	473
Guardians and Wards Act 1890	473

The Hindu Minority and Guardianship Act 1956

Preamble	479
Rules of interpretation of a statute	479
1. Short title and extent	480
'Domiciled'	480
Commencement and extent	480
2. Act to be supplemental to Act 8 of 1890	480
Act is supplemental to the Guardians and Wards Act	480
3. Application of the Act	481
Persons governed by the Act	482
4. Definitions	482

Table of Contents

5. Overriding effect of Act	483
Overriding effect of the Act	484
6. Natural guardians of a Hindu minor	484
Natural guardians	485
‘...excluding his or her undivided interest in joint family property’	487
Clause (a): Father—Mother: custody	487
Clause (b)	489
Clause (c)	489
Disqualifications	489
Step-father; step-mother	490
Nature of proceedings	490
7. Natural guardianship of adopted son	490
Guardianship of adopted son	490
Guardianship of adopted daughter	491
8. Powers of natural guardian	491
Powers of natural guardian	492
Minor’s estate	493
Personal covenant	494
Sub-section (2): Limitation of powers of natural guardian	495
Sub-section (3)	496
Sub-sections (4) and (5): Sanction of Court: Practice	497
Sub-section (6): ‘court’	498
9. Testamentary guardians and their powers	499
Testamentary guardians and their powers	499
Sub-sections (1) and (2)	500
Sub-section (3)	501
Sub-section (4)	502
Sub-section (5)	502
10. Incapacity of minor to act as guardian of property	503
Incapacity of minor to act as guardian of property	503
11. De facto guardian not to deal with minor’s property	504
De facto guardian	504
12. Guardian not to be appointed for minor’s undivided interest in joint family property	507
Guardian of minor’s undivided coparcenary interest	507
13. Welfare of minor to be paramount consideration	508
Welfare of minor to be the paramount consideration	508

The Hindu Adoptions and Maintenance Act 1956

Introductory Note

Adoption in Hindu law	511
Maintenance of dependants	512
Wide and extensive application of the Act	512
Scheme of the recent legislation	513
Requirements of valid adoption under previous law	513
Woman treated as in equali jura	514
Scheme of the chapter on adoptions	514
Requirements of a valid adoption under the Act	515
Capacity of a male Hindu to adopt a son as well as a daughter	515
Capacity of female Hindu to adopt son as well as a daughter	515
Who can give in adoption	516
Persons who may be adopted	516
Requisite formality; Giving and taking	516
Result and effects of adoption	517
Some other rules	518
Scheme of chapter on maintenance	518
Maintenance of wife	519
Maintenance of children and aged parents	520
Maintenance of dependants of deceased Hindu	520
Persons entitled to maintenance as dependants	520
Discretion of the court	521
Some other rules	522

The Hindu Adoptions and Maintenance Act 1956

Preamble	523
Scheme of codification of Hindu law	523
Codifying Act	524
Rules of interpretation of a statute	524

CHAPTER I

Preliminary

1. Short title and extent.	524
Commencement and extent	524
2. Application of Act	525

Person governed by the Act	526
3. Definitions	526
Interpretation	527
‘Unless the context otherwise requires’	527
Clause (a): ‘Custom’, ‘Usage’	527
Clause (b): Maintenance	527
Clause (c): Minor	527
4. Overriding effect of Act	527
Overriding effect of the Act	528
Act is not retrospective in its operation	529

CHAPTER II

Adoption

5. Adoptions to be regulated by this Chapter	530
Adoptions made after the commencement of this Act	530
Adoption made before the commencement of the Act	531
Sub-section (2): Consequences of a void adoption	531
Gift to person whose adoption is invalid	531
6. Requisites of a valid adoption	532
Requirements of a valid adoption	532
Inter-country adoption	532
7. Capacity of a male Hindu to take in adoption	533
Taking in adoption	533
Capacity of a male Hindu to take in adoption	534
Consent of wife	534
8. Capacity of a female Hindu to take in adoption	535
Capacity of a female Hindu to take in adoption	536
Adoption by widow	536
9. Persons capable of giving in adoption	538
Who may give a son or daughter in adoption	539
Father	539
Mother	539
Sanction of the court	540
10. Persons who may be adopted	541
Persons who may be adopted	541
Clause (i)	542
Clause (ii)	543
Clauses (iii) and (iv)	543

11. Other conditions for a valid adoption	544
Introduction	545
Clause (i): Adoption of a son can be only by a person who has no son	545
Clause (ii): Adoption of a daughter can be only by a person who has no daughter	546
Clause (iii): Age of adoptive father	547
Clause (iv): Age of adoptive mother	547
Clause (v): Simultaneous adoption	547
Clause (vi): Act of adoption and ceremonies incidental to it	547
'Must be actually given and taken'	548
Child	548
Power vests only in the father or the mother	549
Free consent	549
12. Effects of adoption	549
Result and effects of adoption	550
'...for all purposes with effect from the date of adoption'	551
'For all purposes'	551
Adoption by widow	551
Proviso (a)	552
Proviso (b)	552
Proviso (c): No divesting of estate vested in any person before the adoption	554
13. Right of adoptive parents to dispose off their properties	557
Right of adoptive parents to dispose of their properties	557
14. Determination of adoptive mother in certain cases	558
Determination of adoptive mother in certain cases	559
15. Valid adoption not to be cancelled	561
Valid adoption cannot be cancelled	561
16. Presumption as to registered documents relating to adoption	561
Presumption arising from registered document relating to adoption	562
17. Prohibition of certain payments	563
Prohibition of payment of consideration or reward for adoption ..	563

CHAPTER III

Maintenance

18. Maintenance of wife	564
-------------------------------	-----

Table of Contents

Maintenance of wife	565
Interim maintenance	566
Sub-section (2): Right to separate residence and maintenance	567
Clause (a) Desertion	567
Clause (b): Cruelty	568
Clause (c): Leprosy	569
Clause (d): Husband having another wife	569
Clause (e): Keeping a concubine	573
Clause (f): 'Ceased to be a Hindu by conversion'	573
Clause (g)	574
Past maintenance	574
Sub-section (3): Unchaste wife: Wife converted to another religion	575
19. Maintenance of widowed daughter-in-law	575
Maintenance of widowed daughter-in-law	576
Interim maintenance	578
20. Maintenance of children and aged parents	578
Maintenance of children and aged parents	578
Interim maintenance	580
Sub-section (3)	581
21. Dependants defined	581
Widowed daughter of a deceased	582
22. Maintenance of dependants	582
Dependants: Maintenance of dependants	583
Widow: Remarriage	584
Widow of a deceased coparcener	585
Unmarried daughter	585
Sister	585
Illegitimate son of a sudra	585
Avaruddha stri	585
Sub-section (3)	586
Sub-section (4)	586
23. Amount of maintenance	586
Assessment of quantum of maintenance payable under the provisions of the Act	587
Sub-section (1): Discretion of the court	588
Sub-section (2)	588
Claimant living separately	590
Claimant's own earnings	590
Sub-section (3)	590
Arrears of maintenance	591

Table of Contents

24. Claimant to maintenance should be a Hindu	591
Claimant to maintenance should be a Hindu	591
25. Amount of maintenance may be altered on change of circumstances	591
Variation of order or agreement fixing maintenance	592
26. Debts to have priority	593
Debt payable by estate of deceased to have priority over claim for maintenance unless there is a charge created in respect of the same	593
27. Maintenance when to be a charge	593
Maintenance when to be a charge	593
28. Effect of transfer of property on right to maintenance	594
Effect of transfer of property on right to maintenance	594

CHAPTER IV

Repeals and Savings

29. Repeals	595
30. Savings	595
Saving	596

APPENDIX I

The Hindu Disposition of Property Act 1916	597
--	-----

APPENDIX II

The Hindu Inheritance (Removal of Disabilities) Act 1928	599
--	-----

APPENDIX III

The Child Marriage Restraint Act 1929	601
---	-----

APPENDIX IV

The Hindu Gains of Learning Act 1930	604
--	-----

APPENDIX V

The Hindu Women's Rights to Property Act 1937	606
---	-----

APPENDIX VI

The Benami Transactions (Prohibition) Act 1988	607
--	-----

<i>Index</i>	611
--------------------	-----

TABLE OF CASES

A

- A Jayachandra v Aneel Kaur, 110
 A Parasurama Reddiar v Arunachala Rediar, 177
 A Premchand v Padmarya, 87
 A v B, 83, 224
 A v H, 95, 105
 A Venkateswarlu v Government of Andhra Pradesh, 21
 Abayolla M Subba Reddy v Padmamma, 247, 570
 Abdul Hakim v Fazu Miya, 22
 Abha Agarwal v Sunil Agarwal, 220
 Achuthan Nair v C Amma, 327
 Achutrao v Union of India, 400
 Adaji Bhikaji v Rukmabai, 59
 Adam v Gopala Krishnhan, 580
 Adarsh Parkash v Sarita, 212
 Addl Commr of Income-tax v PL Karuppan Chettiar, 341, 342
 Adhyatma Alwar v Sri Devi, 70
 Adinarayana v Ramahari, 402
 Administrator-General v Premlal, 21
 Aftabuddin Khan v Chandan Bilasini, 562
 AG of Alberta v AG of Canada, 19
 Aghunandan Saran v Pyarelal Workshop Pvt Ltd, 19
 Aher Mensi Ramsi v Aherani Bai Mani Jetha, 575
 Aina Devi v Bachan Singh, 75
 Ajab Singh v Ram Singh, 402
 Ajay v Pramula, 264
 Ajit Kumar v Kanan Bala, 187
 Ajit Kumar v Satya Bala, 443
 Ajitrai Mejta v Vasumati, 143
 Akasam Chinna v Parbati, 240, 250
 Akshamma v Kamalamma, 46
 Alka Bhaskar Bakre v Bhaskar Bakre, 266
 Alka Sharma v Abhinesh Sharma, 48, 84, 122
 Allen v Allen, 134
 Aloka De v Mrinal Kanti De, 115
 Alopbai v Ramphal, 208
 Amar Kanta v Sovana Sen, 255
 Amar Kaur v Raman Kumari, 382
 Amar Singh v Baldev Singh, 378
 Amar Singh v Sewa Ram, 385, 391, 392
 Amar Singh v Tej Ram, 563
 Amarlal v Vijaybai, 75
 Amarthala Hemalatha v Desari Ballu Rejendra Varaprasad, 18, 95
 Ambayamma v Ganapathi, 592
 Ambi Pundalik v Pandalik, 272
 Ambujam v TS Ramaswamy, 132, 272
 Amdal Ammal v Sadasivan Pillai, 18
 American Home Products Corp v Mac Laboratory Pvt Ltd, 19
 Amina Roy v Mohan Roy, 84
 Amirtha v Sornam, 496
 Amirtham Kudumbah v Sarnam, 496
 Amirthammal v Vallimayil Amma, 84
 Amit Kumar Sharma v Fifth Addl District Judge, 241
 Amita v KR Kachba, 96, 99
 Ammal v Vanniar, 272
 Amman Kaur v Raman Kumari, 408, 409
 Amrik Singh v Narinder Kaur, 235
 Amruta Arora v Union of India, 562
 Ananda v Haribandhu, 316
 Anandi Devi v Rajaram, 277

Table of Cases

- Anandibai v Sundarabai, 387
 Anandji Haridas and Co v
 Engineering Mazdoor Sangh, 16
 Anant v Jankibai, 452, 454
 Anath Bandhu v Chanchala Bala, 391
 Andal Ammal v Sivaprakasa, 390
 Angalla Padmalatha v A Sudarshan, 126
 Angammal v Ramalinga, 403
 Angrez Kaur v Baldev Singh, 159
 Anhia Mandalanin v Baijnath, 418, 425
 Anil Bhardwaj v Nirmlesh Bhardwaj,
 116
 Anil v Sudhaben, 152
 Animuthu v Gandhiammal, 576, 577
 Anirudha Jagdaorao v Bala Rao, 544
 Anita Singh v Laxmi Narayan Singh,
 157
 Anita v Biredra Chandra, 191
 Anita v Birendra, 272
 Anita v R Rambilas, 163
 Anjan Kumar v Monakshi, 190
 Anjanbai v Ramprasad, 393
 Ankush v Janabai, 551
 Anna Saheb v Tarabai, 65
 Annamalai v Perumayee Ammamal, 570
 Annapuramma v Ramakrishna, 235
 Annapurna v Kalpana Debi, 387, 390
 Annapurna v Sukumar, 228
 Annapurnamma v Appa Rao, 65, 145
 Annapurnamma v Bhima Sankerrao,
 406
 Annjana Desi v Prahlad, 85
 Anoop Kaur v Anup Singh, 400
 Ansuya v Rajaiah, 256
 Antala Gope v Sabo Gopain, 273
 Anubha v Vikas Aggrawal, 70, 157
 Anupama v Bhagaban, 190, 208
 Anupoma v Bhagaban, 208, 227
 Anuradha v Santosh Nath, 240
 Anuradha v Santosh, 239
 Anurag Anand v Sumita, 87
 Anvu Anandan v D Sivakumari, 65
 Apan Chakraborty v Anjali, 114
 Aparti Bewa v Suna Stree, 359, 424
 Appa Saheb v Gurubasamma, 460
 Appalanaidu v Narayana, 324
 Appaswami v Sarangapani, 400
 Apurba v Manashi, 207
 Arakhita Swain v Kanduri Swain, 562
 Arakhita v Hari, 406
 Archana v PK Tomar, 153
 ARM Rajoo v Hansha Rani, 248, 249
 Arti Singh v Kunwar Pal Singh, 233
 Arumuga v Nachemuthu, 387
 Arumugha v Vallimmal, 551
 Arun Kumar v Anjana, 566
 Arun Kumar v Chandravati, 487, 493
 Arun Kumar v Jnanendra, 451, 454,
 460
 Arun Kumar v Nalin, 98
 Arun Kumar v Radha Arun, 104
 Arun Mullick v Dorothea Mitra, 253
 Arun Vamanrao v Lina Arun, 244
 Aruna Mullick v Dorothea Mitra, 242,
 253
 Arunachalathammal v Ramachandran,
 311 B, 357, 364, 408, 424
 Arunima Bhattacharjee v Shyama
 Prasad Bhattacharjee, 95
 Arvind Mohan v Amulya Kumar, 19
 Arya Kumar v Ila, 235
 Aryasomayajulu v Surya Kumari, 128
 AS Sailaja v Principal KM College,
 551
 Asha Handa v Baldev Raj, 190
 Asha Rani v Amrat Lal, 143
 Asha Rani v Gulshan Kumar, 73
 Asha Srivastava v R K Srivastava, 87
 Asharam v Sarjubai, 381
 Ashcroft v Ashcroft and Roberts, 254
 Ashok Hurra v Rupa Bipin Zaveri, 162
 Ashok Hurra v Rupa Bipin Zeeveri,
 164
 Ashok Kumar v Prem Arora, 139
 Ashok Kumar v Sangitabai, 265
 Ashok Kumar v Shabnam, 95
 Ashok v Vishwa Bharti, 185
 Ashokkumar v Vijay Laxmi, 118
 Asoke Naidu v Raymond S Malu, 460
 Asst. Controller of Estate Duty v
 Balkrishna Menon, 330
 Aswini Kumar v Arabinda Bose, 21
 Atava Akulamma v Gajjela Reddy, 403
 Atma Ram v Kala Wati, 272
 Atmaram v Narbada, 63
 Attorney-General v Prince Ernest
 Augustus of Hanover, 291
 Augustin v Augustin, 117
 AV Janardhana Rao v M Aruna

Kumari, 207
 Avinash Prasad v Chandra Mohini, 98
 Ayi Ammal v Subramania Asari, 423,
 424
 Ayodhya Singh v Meera Devi, 134
 Ayyappa v Parukutti Amma, 278

B

B (L) v B (R), 116
 B Chandrashekhara Reddy v State of
 Andhra Pradesh, 463
 B Vasanthi v Bakthavatchalu, 490
 Baboolal v Prem Lata, 240
 Babu Ram v Kanta Devi, 109, 139
 Baburam v Keshwa Chand, 486
 Baburao v Sushila, 230
 Baby Rashmi Mehra v Sunil Mehra,
 589
 Baby v Jayant, 55
 Badri Pershad v Kanso Devi, 382,
 388, 398, 399
 Badri Prasad v Urmila, 250
 Badsha Mia v Rajjab Ali, 19
 Bagarshettar v Pattanshitti, 454
 Bagwan Dass v Pratibha Rani, 412
 Bai Champa v Chandrakant, 386
 Bai Jivi v Narsingh Lalbhai, 59
 Baijnath Kaur v Maheshwari Devi, 402
 Baijnath v Ramautar, 384
 Baimani v Jayantilal Dahyabhai, 153,
 211
 Bajirao v Tolanbai, 238, 244
 Bajya v Gopikabai, 303, 428
 Baker v Baker, 117, 127, 133
 Bakhtawari v Sadhu Singh, 390
 Bakshi Ram v Brij Lal, 394
 Bakshi Ram v Shila Devi, 486
 Bakurao v Neroji, 392
 Bal Kishan v Urmila, 43, 212
 Balakrishna Menon v AC of Estate
 Duty, 316
 Balakrishna Menon v Asst Controller
 of Estate Duty, 326, 329, 330
 Balanda v Dunni Chand, 406
 Balaram v Suryaja, 180
 Balasaheb v Jaimala, 423
 Balasaheb v Jinwala, 409
 Balasubramaniam v Suruttayan, 56

Balbir Kaur v Harinder Kaur, 577
 Balbir Kaur v Maghar Singh, 86
 Balbir Kaur v Raghubir Singh, 240
 Balbir Singh v Bholi, 120
 Balbir Singh v Swaran Kanta, 239
 Baldeo Prasad v Arya Priti Nidhi,
 147
 Baldev Raj v Urmila Kumari, 88
 Baliram v Radhika Devi, 566
 Balkrishna Kaimal v Gopala Kaimal,
 437
 Balkrishna Menon v Inspecting Asst
 Commr, 330
 Balkrishna v Sadashiv, 544
 Balkrishna v Sangeeta, 268
 Balraj v Jagatpal, 22
 Balu Ram v Keshav Chand, 509
 Balusami v Balakrishna, 50
 Balvant Kaur v Chanan Singh, 577,
 582
 Balvinder Singh v Gurpal Kaur, 277
 Balwant Kaur v Chanan Singh, 404
 Balwant Kunwar v Addl Munsiff
 Dehradun, 187
 Balwant Singh v Balwant Kaur, 67
 Banabai v Wasudeo, 554
 Banarsi v Marcchia, 388
 Banerjee v Banerjee, 185
 Bani Devi v Banerjee, 142
 Bank of England v Vagliano, 21
 Bank of India v SP Pannamma, 327
 Bank of New Ltd v Poonamma, 469
 Bankim Chandra v Anjali, 240, 271
 Banso v Charan Singh, 301, 393
 Banti Devi v Moti Ram, 152
 Banwar Lal v Kamla Devi, 235
 Bapurao v Neroji, 390
 Bapusaheb v Gangabai, 399, 403
 Barker v Barker, 98, 196
 Bartholomew v Bartholomew, 131
 Bartram v Bartram, 135
 Basanti Mohanty v Parikshit Rout, 566
 Basavalingamma v Sharadamma, 323
 Bastable v Bastable, 205, 211
 Basudeb Sarkar v Chhaya Sarkar, 567
 Baswant Gauda v Channabasawwa, 387
 Bathula Iylaish v B Devamma, 156
 Baxter v Baxter, 79, 82

Table of Cases

- Beale v Beale, 221
 Becker v Becker, 224, 226
 Beeby v Beeby, 218
 Bejoy v Aloka, 65
 Bellenden v Satterthwaite, 263
 Bengal Immunity Co Ltd v State of Bihar, 315
 Bepin Behary v Lakshasona, 393
 Besant v Narayaniah, 489
 Bhadra Reddy v Shanthamma, 573
 Bhagat Ram v Teja Singh, 408, 409
 Bhagat v D Bhagat, 118
 Bhagirathi Chatoi v Adikanda, 448
 Bhagirathi Khan v Nanibahu, 392
 Bhago v Bachni, 593
 Bhagwan Dutt v Kamla Devi, 588
 Bhagwan Singh v Amar Kaur, 97, 104
 Bhagwan v Vishwanath, 395
 Bhagwani v Gilli, 415
 Bhagwat v Bhagwat, 113
 Bhagyawati Jain v General Public, 470
 Bhaiya Ramanuj v Lalu Maheshanuj, 307
 Bhallabha Das Shah v Sushila Bai, 102
 Bhan Kaur v Isher Singh, 158
 Bharat Ram v Ram Kali Devi, 129
 Bharat Trading Ltd v P Nachiar Ammal, 322
 Bharawan Bai v Lila Ram, 187
 Bharucha v Bharucha, 244
 Bhaurao v State of Maharashtra, 46, 54, 180
 Bhausahab v Leelabai, 246, 570
 Bhavana Adwani v Manohar, 130, 161
 Bhawan Koer v Bose, 26
 Bhawar Singh v Pilabai, 388
 Bhika Bai v Mamta Bai, 413
 Bhima Kotha v Sarat Chandra, 535
 Bhimadas v P Kanthamma, 422
 Bhola Nath v Santosh Prakash, 447
 Bhola Ram v Madanlal, 402
 Bhuneshwar Prasad v Dropta Bai, 191
 Bhura v Kashiram, 400
 Bhuri Bai v Champa Bai, 300, 343, 390
 Bhushan Lal v Suresh Kumar, 403
 Bibba v Ram Kali, 54
 Bijal Bhatt v Chandresh Bhatt, 164
 Bijal Dave v Parag, 233
 Bijoli Chaudhuri v Sukomal Chaudhury, 204
 Bijoy Krishna Ghoshal v Namita Ghosha, 268
 Bikram Singh v Sudarsan Singh, 187
 Bikranjit Singh v Iqbal Kaur, 488
 Billabasini v Dulal, 388
 Bimla Devi v Singh Raj, 152
 Binda Prasad Singh v Mundrika Devi, 592, 593
 Bindbashini v Sheorati, 403
 Bindroo v Munshi, 402
 Binujak v Chandra, 240
 Bipin Chander v Prabhawati, 124, 126, 128, 136, 209, 211
 Bipinchandra v Madhuriben, 80
 Bipinchandra v Prabhavati, 207
 Bippar Singh v Mohinder Kaur, 87
 Birendra Kumar Biswas v Hemlata Biswas, 80
 Biro v Banta Singh, 457
 Bisarti v Sukarti, 390
 Bishun Deo v Seogani Rani, 87
 Bishunlal v Jagarnath, 18
 Biswanath Charit v Damodar Patra, 495
 Biswanath v Anjali, 70
 Biswanath v Badami Kaur, 380
 Blacks Law Dictionary, 572
 Blanche Somerset v Bleach, 263
 Blunt v Blunt, 215, 223
 Blyth v Blyth, 205, 211, 222
 BN Panduranga Shet v SN Vijayalakshmi, 141
 Bootan Bai v Durgaprasad, 187
 Bouramma v Siddappa Jeevappa, 565
 Bowran v Bowran, 129
 Brahma Vart Sanatan Dharam Mandal v Kanhaiyalal Bagla, 390
 Braj Kishore v Rekha, 268
 Bravery v Bravery, 116
 Brewer v Brewer, 129, 167
 Bright v Bright, 186, 195
 Brij Lal v Daulat Ram, 341
 Brij Vallabh v Sumitra, 81

Brijmohan v Tulsiram, 22
 Buchler v Buchler, 131, 132
 Budhi Jena v Dhobai Naik, 504
 Budhi Sahu v Zohurani, 49
 Bulaki v Lal Dhar, 381
 Bulbul Samantaray v Dhirendra Kumar, 241
 Burch v Burch, 217
 Buta Ram v Veeru Ram, 491
 Butterfield v Butterfield, 158

C

C Hengsu v R Bontra, 328
 C Masilamani Mudaliar v Idol of Sri Swaminath Swamy, 405
 C Obula Konda Reddy v C Pedda Venkata, 570
 C Sarala v K Nalinakshan, 190
 C v C, 82
 Cackett v Cackett, 116
 Cade v Cade, 108, 138
 Carol v Carol, 185
 Carpenter v Carpenter, 138
 Casey v Casey, 137
 Cavendish-Bentinck v Cavendish-Bentinck, 231
 Central Bank of India Ltd v Ram Narain, 23
 Chajju Ram v Bhuri, 406
 Chaman Lal v Mohan Lall, 457
 Chamanlal v Rupa, 78
 Champa Devi v Madho Saran Singh, 402, 397
 Champa v Chandrakanta, 395
 Chanamma v Lingamma, 402, 403
 Chanan Singh v Balvant Kaur, 404, 577
 Chanchal Kumari v Kewal Krishan, 79
 Chand Dhawan v Jawaharlal Dhawan, 235, 247, 251, 565, 568, 571
 Chand Narain v Saroj, 65
 Chanda v Nandu, 97, 103
 Chandan Bilasini v Aftabuddin Khan, 532
 Chandana Roy v Goutama, 237
 Chandarani Soha v Kaushik Soha, 237
 Chander Kanta v Mohinder Pal Dogra, 184, 198

Chander Prabha v Prem Nath, 265, 488
 Chander Prakash v Sudesh Kumari, 150, 190
 Chandi Charan v Bhagyadhar, 460
 Chandnee Vidyavati Madden v Kotial (Dr), 495
 Chandra Dev v Rani Bala, 273
 Chandra Kishore v Nanak Chand, 580
 Chandra Mohini v Avinash Prasad, 99, 171, 172, 217
 Chandra Swaroop v Manorama Sinha, 269, 273
 Chandrabhagabai v Rajaram, 155, 215
 Chandradatta v Sanatkumar, 316
 Chandradip Rai v Mahip Rai, 390
 Chandraiah v Chandraiah, 390
 Chandrakant v Shardabai, 240
 Chandrakanta v Hans Kumar, 161
 Chandramathi v Pazhetti Balan, 100
 Chandrani Bai v Pradeepkumar, 396, 563
 Chandrasekhar v Sivaramakrishan, 385
 Charan Singh v Major Singh, 176
 Charlesby v Charlesby, 169
 Chater Bhuj v Gurpreet Singh, 496
 Chaturbhuj v Sarbeshwar, 393
 Chellamma v Narayana, 302
 Chellammal v Valliammal, 397, 401
 Chellappan Nair v Madhavi Amma, 278
 Chetan Dass v Kamla Devi, 96, 212
 Chhabubai Shinde v Balwantroa Shinde, 389
 Chhagan Karsan v Bhagwanji Punja, 273
 Chhote Lal v Kamla Devi, 227
 Chichester v Chichester, 236
 Chillingworth v Bate, 445
 Chimappvu v Meenakshi, 390
 Chinnakolandi v Thanji, 386, 395
 Chinnammal v Kannagi, 404
 Chinnathayi v Narayanaswami, 171
 Chintala Venkata v Shyamala, 127
 Chinti v Daultu, 389
 Chiranjeev v Lavanya, 96
 Chiranjilal Srilal Goenka v Jasjit Singh, 558

- Chitra v Dhruba Jyoti, 231, 236, 237
 Chitralekha v Ranjit Rai, 235
 Chokalingam v Alamelu Ammal, 381, 382
 Chuni Lal v Krisha Rani, 235, 249
 Churchman v Churchman, 213, 215
 Churchward v Churchward and Holliday, 222
 Clear v Clear, 254
 Cleland v Cleland, 199
 Cohen v Cohen, 128, 129, 131
 Collins v Collins, 101
 Commr of Agricultural Income Tax v Chullikkan Parameswara Bhat, 313, 316, 317
 Commr of Gift-tax v Bandi Subba Rao, 526
 Commr of Income Tax v Ram Rakhpal, 341
 Commr of Income-tax v Mukundgirji, 342
 Commr of Income-tax v Nagarthnamma, 316
 Commr of Sales-tax v Parson Tools and Plants, 20
 Commr of Wealth Tax v Champa Kumari, 294
 Commr of Wealth Tax v Chander Sen, 300, 340
 Commr of Wealth Tax v R Sridharan, 26
 Commr of Wealth-tax v Kantilal, 316
 Commr of Wealth-tax, Kanpur v Chander Sen, 341
 Controller of Estate Duty v S Harish Chander, 315
 Cooper v Cooper, 111
 Corbett v Gorbett, 266
 Cox v Cox, 134
 Crabb v Crabba, 66
 Cramp v Cramp, 121, 215
 CS Mangalam v Velayudhan Asari, 240
 CS Reddy v Yamuna, 488, 509
 Cundy v Cundy, 220
- D**
- D Balakrishnan v Pavalamani, 79
 D Parthasarthy v Vinayaprabha, 119
 D Udayar v Rajarani, 566
 Daddo v Raghunath, 339
 Dakshaben v Dineshbhai, 490
 Dal Chand v Swarn Pratap, 187, 190, 273
 Daljit Singh v S Dara Singh, 577
 Damidharao v Meera, 241
 Damodar Rao v Bhima Rao, 385, 390
 Daneraiji v Chandraprabha, 596
 Daneyi Gurumurty v Raghu Podhan, 505
 Dani v Natha Singh, 415
 Daniraiji v Vahuji Maharaj Chandraprabha, 529, 561, 596
 Darbara Singh v Karminder Singh, 496, 494
 Darshan Kaur v Mallock Singh, 249
 Darshan Prasad v Civil Judge, 70
 Darshan Singh v Daro, 271
 Darshan Singh v Das, 250
 Dashrath v Guru Bewa, 27, 295
 Dashrath v Pandu, 536
 Dashrath Yadav v Saroj, 235
 Dassi v Dhani Ram, 272
 Dastane v Dastane, 111, 119, 142, 205, 212, 216, 221
 Datu Bhau v Tarabai, 565
 Daya Singh v Dhan Kaur, 334, 392, 394, 409
 Dayal Singh v Bhajan Kaur, 246, 253
 Dayrell-Steyning v Dayrell-Steyning, 259
 DE v AG, 82
 Deacock v Deacock, 246
 Debi Bhaduri v Kumarjib Bhaduri, 273, 274
 Debi Prasad v Sandhya Devi, 241, 566
 Deepika v Nareshchandra Singhanian, 120
 Deepo v Kehar Singh, 62, 155
 Dennis v Dennis, 97
 Deoki Nandan v Girand Singh, 583
 Desouza v Desouza, 183, 185
 Despatie v Tremblay, 21
 Dev Dutt Singh v Rajiv Gandhi, 237
 Devasakayam v Devamony, 250
 Devendra Kumar v Chand Rani, 217
 Devendra Singh v State of Madhya Pradesh, 406

Table of Cases

- Devgonda Patil v Shamgonda Patil, 532, 542, 553, 555, 562
- Devi Sharma v Chander Mohan, 55, 78, 142
- Devidas v Gyanwale, 216
- Devinder Singh v Harminder Kaur, 566
- Devinder Singh v Jaspal Kaur, 250
- Devineni v Swaramiah, 505
- Devki v MV Kumaran, 327
- Devki v Purshotam, 239
- Devyani v Kantila, 98
- Dey v Dey, 114
- Dhananjaya v Gajra, 303
- Dhanasekaran v Manoranjithammal, 494, 505, 507
- Dhani Ram v Sushila, 272
- Dhanishtha Kalita v Ramakanta, 379
- Dhanjit Vadra v Beena Vadra, 164
- Dhanraj v Suraj Bai, 532, 540, 544, 548
- Dharam Dev v Raj Rani, 226
- Dharamshi v Bai Saker, 246, 249, 252, 253, 255, 264
- Dharamwati Bai v Shiv Singh, 403
- Dharmendra Kumar v Pushpa Devi, 228
- Dharmendra Kumar v Usha Kumar, 152, 217
- Dharwar Urban Bank Ltd v Krishnarao, 22
- Dhirar Sen v Ramesh Chandra, 236
- Dhulappa v Krishnabai, 272
- Digvijay Singh v Pratap Kumari, 78
- Dilipbhai v State of Maharashtra, 228
- Dina Nath v Sati Prosad, 21
- Dinaji v Daddi, 555
- Dindayal v Rajaram, 391
- Dinesh v Usha, 236
- Dipti Ghosh v Swapankumar Ghosh, 231
- Dixon v Dixon, 63
- DK Trivedi and Sons v State of Gujarat, 21
- DM Jayamma v Muniyamma, 324
- DN Sharma v Usha Sharma, 118
- Donaldson v Donaldson, 260
- Donoghue v Stevenson, 106
- Doraiswamy v E Balasubramaniam, 503
- Douglas v Douglas, 213
- DP Gopala v Pushpaveni, 206
- DS Agalawe v PM Agalawe, 555
- Duchesne v Duchesne, 261
- Dulei Bewa v Bimali Bewa, 388
- Dunn v Dunn, 124, 139, 220
- Durant v Durant, 219
- Durga Das v Tara Rani, 249, 253
- Durjyodhan Swami v S Sethi, 422
- Durjyodhan v Bengabati Dei, 49
- Dwarkanath v Tafazar, 21
- Dwijabrata Das v Debabrata Das, 447
- ### E
- East End Dwelling Co Ltd v Finsbury Borough Council, 315, 550, 559
- Eastern Countries Co v Marriage, 21
- Edamma v Hussainappa, 277
- Edwards v Edwards, 63, 131
- EK Raghawan v KK Saraja, 235
- Ekradeshwari v Homeshwar, 259, 589
- Elambilakkat Chandrasekharan v Moroth Seethamani, 301, 313
- Elizabeth Dinshaw v Arvind Dinshaw, 490
- Elokeshi Chakraborty v Sunit Chakraborty, 126
- Em Parkash v Roshani, 100
- Emmanual v Mandakini, 216, 217
- England v England, 99
- Eramma v Veerupana, 334, 378, 390, 404
- Essakkyal Nadar v Sreedharan Babu, 505
- Evans v Evans, 149
- Everitt v Everitt, 137, 138
- ### F
- F v F, 100
- F v P, 82
- Fairman v Fairman, 101, 204
- Fakeer Bux v Saira Begum, 293
- Fathimunnisa Begum v T Rajagopalcharyulu, 322, 323
- Finch v Finch, 18

Flowers v Flowers, 185
 Forbes v Forbes, 116
 Ford v Ford, 217
 Foster v Foster, 133
 Fowler v Fowler, 116
 France v France, 140
 Fraser v Fraser, 128

G

- G Annamalai Pillai v Dist Revenue Officer, 495
 G Appalanaidu v G Narayanamma, 323
 G Appanna v G Seethamma, 566
 G Kondiah v G Ankamma, 104
 G Madhavan Nair v S Radhamony, 278
 G Nirmalaamma v G Sithapathi, 175, 299
 G v G, 81, 82
 G v M, 83
 G Valli v State of Andhra Pradesh, 463
 Gadam v Venkatarajalu, 403
 Gajapati v Dukhnashini, 566
 Gajara Naran Bhura v Kanti, 49
 Gajendra v Madhu Malti, 96, 126
 Gajna Devi v Pursotam, 152
 Gajodhara Devi v Gokul, 390
 Gallagher v Gallagher, 128
 Galler v Galler, 101, 204
 Ganesan v Rasammal, 231
 Ganesh Mahanta v Sukriya Bewa, 386, 395
 Ganeshji v Hastuben, 80
 Gangabai v Bherulal, 509
 Gangadevi v Krushna Prasad, 190
 Gangadhar Charan v Saraswati, 390
 Gangadhar v Manjula, 272
 Gangadhar v Saraswathi, 302
 Gangoji Rao v Channappa, 494
 Gangu v Pundlik, 233, 238, 241
 Ganta Nagamani v Ganta Laxmanrao, 217
 Garasia v Mansu, 164
 Gardner v Gardner, 117, 156
 Garja Singh v Surjit Kaur, 54
 Gauri Dey v Bidhu Bhushan Dey, 205
 Gaya Prasad v Bhagwati, 62
 Gayer v Gayer, 189
 Geeta Gokarna v Satish Gokarna, 244
 Geeta Lakshmi v Sarweswar Rao, 153
 Geeta Mullick v Brojo Gopal Mullick, 46, 95
 Geevanlal Ltd v Appellate Authority, 19
 Germanthangi v F Rokunga, 119
 Getty v Getty, 101
 Ghasiram Das v Arundhati, 240
 Ghavrevala v Hanuman Prasad, 447
 Gheesi v Shri Rama, 488
 Gian Devi v Amar Nath, 566
 Giani Ram v Ramji Lal, 300
 Gilbey v Gilbey, 257
 Gindan v Barelal, 49
 Ginnappa v Kallanna, 403
 Giono v Moti Ram, 390
 Girdhar Singh v Anand Singh, 494
 Girdharilal and Sons v Baluir Nath, 19
 Girija Kumari v Vijayanandan, 162
 Girwar Singh v Premavati, 187
 Gitabai v Fatto, 155
 Githa Hariharan v Reserve Bank of India, 486
 Glaxo Laboratory India Ltd v Presiding Officer, Meerut, 19
 Godabai v Narayan, 72
 Golakchandra v Krutibas, 547
 Gollins v Gollins, 108
 Golloway v Golloway, 265
 Gomathi Ammal v P Muthukrishnan, 454
 Gomathi v Kumaragurukaran, 150
 Gomathi v Natrajam, 186
 Goodden v Goodden, 254
 Goodhall v Goodhall, 263
 Gopal Chandra Mallick v Manjari Mallick, 70
 Gopal Krishan v Mithilesh Kumari, 111
 Gopal Krishnan v R Sarasamma, 278
 Gopal Lal v State of Rajasthan, 180
 Gopal Narain v DP Goenka, 302
 Gopal Narain v Goenka, 300
 Gopal Pandey v Parsotam, 21
 Gopal Prasad v Bansidhar Singh, 448
 Gopal Singh Bhumji v Girbala Bhumji, 295

- Gopala Rao v Sitharamamma, 529, 582, 585, 592
 Gopalkrishnan v Ramulu Reddi, 387
 Gopendra Nath v Prativa Rani, 230, 271
 Gopi Chand v Bedamo Kuer, 334
 Gopi Chand v Bhawani Devi, 301, 303
 Gopi v Madanlal, 534
 Gopisetty v Subarayudu, 402
 Gorachand Mukherjee v Malabika Dutta, 400
 Gorst v Gorst, 214
 Gostha Behari v Haridas, 385
 Goumati v Shankar Lah, 403
 Gour Gopal Roy v Sipra Roy, 23
 Govardhan v Gangabai, 585
 Govind Ram v Lila Devi, 271
 Govind Saran Ganga Saran v CIT, 21
 Govind Singh v Vidya, 237
 Govinda Reddy v Golla Obulamma, 322
 Govindappa v Doddathayappa, 508
 Govindram v Chetumal, 316, 322
 Govindrao v Anandibai, 238, 244, 246, 247, 253
 Gowri Thimma Reddy v State of Andhra Pradesh, 183
 Grey v Pearson, 19
 Griffith v Griffith, 236, 260
 GS Sadashiva v MC Srinivasan, 457
 Gulab Kaur v Gurdev Singh, 154
 Gulab v Kamal, 255
 Gulabchand v Sheokaran Lal, 387
 Gulabchand v Sheokaran, 582
 Gulabrao Balwantrao Shinde v Chhabubai Shinde, 389, 391
 Gulal Chand v Sampati Devi, 241
 Gulazra Singh v Tej Kaur, 583
 Gulmet Singh v Bharpur Kaur, 226
 Gulwant Kaur v Mohinder Singh, 402
 Gummantha v Nagaveniamma, 328
 Gumpha v Jaibai, 405
 Gur Bachan Kaur v Preetam Singh, 133
 Gurbachan Kaur v Ram Chand, 250
 Gurbachan Kaur v Swaran Singh, 271
 Gurbachan Singh v Khichar Singh, 415
 Gurbaksh Singh v Taran Jit, 279
 Gurcharan Kaur v Ram Chand, 76, 246
 Gurcharan Singh v Sukhdeo Kaur, 115
 Gurdas v Prito, 390
 Gurdev Kaur v Channo, 253
 Gurdev Kaur v Sarwan Singh, 65
 Gurdial Kaur v Mukand Singh, 186
 Gurdial Singh v Central Board, Local Committee, Amritsar, 20
 Gurdip Kaur v Ghamed Singh, 577
 Gurdit Singh v Darshan Singh, 346
 Gurmail Singh v Bhuchari, 237
 Gurmeet Kaur v Narinder Singh, 86
 Gurmit Singh v Tara Singh, 304, 393
 Gurmukh Singh v Intazamia Committee, 19
 Gurnam Kaur v Puran Singh, 176
 Gurnam Singh v Ays Kaur, 412
 Gurpreet Singh v Chatterbhuj Goel, 496
 Guru Charan v Adikanda Behari, 56
 Gurunadhan v Navaneethamma, 402
 Gurunath Chetty v Navaneethamma, 399
 Gurupad v Hirabai, 316
 GV Kishan Rao v State of Andhra Pradesh, 317
- ## H
- H v H, 195
 Haddon v Haddon, 256
 Hall v Hall, 133
 Halsbury's Laws of England, 125
 Hanamangouda v Hanamangouda, 403
 Hans Raj v Dhanwant Singh, 301, 304
 Hanumakka v Dase Gowda, 381
 Hanuman Prasad v Indrawati, 384
 Hanumappa v Dase Gowda, 388
 Harak Singh v Kailash Singh, 384, 392
 Haravati v Jasodhara, 343
 Harbans Singh v Chandra Prabha, 139
 Harbans Singh v Tekamani Devi, 333
 Harbhaj v Mohar Singh, 393
 Harbhajan Singh v Brij Balab, 86
 Harchand Singh v Mohinder Kaur, 301
 Harcharan Kaur v Nanchhatdar Singh, 161
 Hardeep Singh v Dalip Kaur, 63

Hari Dutt v Shiv Ram, 403
 Hari Ram v Harbans Singh, 395
 Hari Singh v Sireh Kanwar, 301, 470
 Haribai v Baba Anna, 527, 544
 Harilal v Lilavati, 252, 271
 Hariram v Jasoti, 186
 Harish Chandra v Triloki Singh, 383
 Harish Kumar v Anita, 116, 124, 161
 Harjit Kaur v Roop La, 70, 117
 Harmal Kaur v Kartar Kaur, 387, 391
 Harmohan v Kamala Kumari, 74
 Harthan v Harthan, 79
 Harulal v Saudamini Misra, 271
 Harvinder Kaur v Harmandar Singh, 60
 Hearsey v Hearsey, 98
 Heera Lal v Board of Revenue, 555
 Hema Reddy v Rakesh Reddy, 143
 Hema v S Lakshmana Bhat, 237, 258
 Hemalata v Umasankari, 452, 454, 460
 Hemant Kumar v Laxmi Devi, 268
 Henderson v Henderson, 218, 219, 221
 Her Jesa Kachra v Lakhman, 425
 Hickman v Peacy, 445
 Hill v Clifford, 142
 Hillier v Hillier and Latham, 167
 Hillier v Hillier, 167
 Hira Lal v Kumud Behari, 393
 Hirachand Srinivas Managaonkar v Sunanda, 152, 153, 211
 Hirakali v Awasthi, 150, 207, 208
 Hiralal v State of Uttar Pradesh, 19
 Hitesh Joshi v Jesal Joshi, 164
 Holbom v Holborn, 116, 137
 Holden v Holden, 112
 Holya v Jasoda, 412
 Horton v Horton, 82
 Housabai v Jijabai, 544, 555
 HP Veeresh v Channabasamma, 555
 Hudson v Hudson, 194
 Hussain Uduman v Venkatachala Mudaliar, 385
 Hutchinson v Hutchinson, 127
 Hyman v Hyman, 244, 262

I

Ibrahim v Ibrahim, 503
 Income Tax Comm v JH Gotla, 19

Indira Bai v BA Patel, 592
 Indira Devi v Kumaran, 131
 Indira Gangele v Shailendra, 114
 Indira Kashyap v KW Kashyap, 190
 Indra Mal v Babu Lal, 580
 Indraj v Shanti, 274
 Indramal v Radhey Raman, 163
 Indubai v Vyankati, 303, 388
 Inspecting Asst Commr v VK Ramunni, 329
 Iqbal Kaur v Pritam Singh, 108
 Ira Das v Ramesh Mallick, 100
 Iravya v Shivappa, 158
 Ishwar Chander v Pomilla, 155
 Ishwar Das v Raj Kumar, 301

J

J Ananda v JB Narasimham, 190
 J Sudhakara Shenoy v Vrinda Shenoy, 143
 J v J, 82
 Jacintha Kamath v Padmanabha Kamath, 46
 Jadav Parbhatbhai v Parmar Karsanbhai, 505
 Jagadish Lal v Shyama, 65
 Jagamma v Satyanarayanamurthi, 573
 Jagannath Sabar v Gana Bewa, 27, 498
 Jagannathan Pillai v Kunjitha Padam Pillai, 379, 395, 386
 Jagannathan v Kunjithapatham, 395
 Jagannathapuri Guru v Godabai, 388
 Jagannathpuri v Godebai, 401
 Jagaribai v Ramkhilawan, 382
 Jagarlamudi Sujata v Jagarlamudi, 177
 Jagat Singh v Teja Singh, 395
 Jagatsingh v Bhawani Singh, 307
 Jagdish Kumar v Sita Devi, 82
 Jagdish Lal v Shyama, 82
 Jagdish Mahton v Mohammad Elahi, 396
 Jagdish Singh v Additional District Judge, 576
 Jagdish v Manjula, 255, 257
 Jagir Kaur v Jaswant Singh, 184, 190
 Jagir Singh v Baboo Singh, 400
 Jai Dayal v Shankuntla Devi, 119
 Jai Kaur v Sher Singh, 301

Table of Cases

- Jai Lal v Sala Devi, 113
 Jai Ram v Tota Ram, 387
 Jai Rani v Om Prakash, 191
 Jai Singh v Khini Bhiklu, 240
 Jai Singh v Mughla, 409
 Jai Singh v Shakuntala, 548, 562
 Jain v Jain, 232, 566
 Jairath v Jairath, 271
 Jaishree v Mohan, 65
 Jaiwanti Mafatlal v Arvind N
 Mafatlal, 579, 582
 Jal Kaur v Pal Singh, 577
 Jalaja v Lakshmi, 329
 Jalsutram v Jalsutram, 235
 Jamboo Prasad v Malti Prabha, 172
 Jamieson v Jamieson, 106, 107, 110,
 112
 Jamuna Bai v Bhola Ram, 403
 Jamuna Dass v Board of Revenue, 457
 Janabai Ammal v TAS Palani
 Mudalier, 451, 454
 Janak Daulari v Dist Judge Kanpur,
 398
 Janak Dulari v Narain Dass, 187
 Janardan Patel v Sheth Ambalal
 Himatlal, 412
 Jandebi v Upendra, 334, 393
 Jang Bahadur Syal v Mukta Syal, 190
 Janki Kuer v Chharthu Prasad, 384
 Janki v Govinda, 402
 Janku v Kisan, 385, 392
 Jaria Devi v Shyam Sunder, 401
 Jasbir Sehgal v. Dist Judge
 Dehradun, 237
 Jasmal Singh v Gurnam Kaur, 225
 Jaswant Kaur v Harpal Singh, 400
 Jaswantrai v Vimal Vaidya, 200
 Jaswinder Kaur v Kulvant Singh, 152
 Jatindra Mohun v Gouri Bala, 97, 103
 Jayalakshmi v Ganesa Iyer, 460
 Jayalakshmi v Ganesh Iyer, 345, 352
 Jayanilal v Chhanalal, 445
 Jayanti v Kunjabehari, 272
 Jayantilal and Ayi Ammal, 428
 Jayantilal v Asha, 533
 Jayantilal v Chhanalal, 423, 424
 Jayaraj v Seeniamma, 80
 Jayashree v Ramesh, 161
 Jeapes v Jeapes, 118
 Jeevanram v Lachmidevi, 447
 Jeevanti v Kishan Chandra, 184
 Jethabhai v Manabai, 69, 152
 Jhaverbhai v Kabhai Bechar, 497
 Jhugli Tekam v Asst, Commr, 440
 Jijabai v Pathankhan, 485
 Jinia Keotin v Kumar Sitaram Manjhi,
 175, 178
 Jiviben v Dahyalal, 156
 Jivubai v Ningappa, 126, 190, 228
 JL Nanda v L Nanda, 114
 Jogeshwar Prasad v Jyoti Rani, 239
 Joginder Singh v Kehar Singh, 302, 380
 Joginder Singh v Pushpa, 207, 213
 Jogindra Kaur v Shivcharan Singh, 61
 Jose v Ramakrishna Nair
 Radhakrishnan, 379
 Joseph v Ramamma, 204
 Joshi v Ganga Devi, 237
 Joti v Mankubai, 554
 Joyita Saha v Rajesh Kumar Pandey,
 55
 Joytish Chandra v Meera Guha, 224
 Judhistir Sahu v Sesha Patro, 393
 Julam Missir v Pradip Missir, 384
 Jupudi Venkata v Kesava Rao, 564
 Jyothi Pai v Pratap Kumar Pai, 63
 Jyoti Prakash v Chameli, 566
 Jyoti Sarup v Lalita, 139
 Jyotish Chandra v Meera Guha, 99,
 131, 204
 Jyotsnaben v Pravinchandra Tulsidas,
 80

K

- K Devabalan v M Vijayakumari, 26
 K Jagannathan v Vasudevan Chettiar,
 483
 K Kanthimathi v SP Iyer, 62, 65
 K Kumar v Onkar Nath, 496
 K Kunhikannan v NV Malu, 255
 K Om Prakash v K Nalini, 164
 K Poppamal v S Bhagawati, 190
 K Raj v Muthamma, 350
 K Ramopi v K Kameswari, 65
 K Shankare Gowda v Bharathi, 566
 K Venkata Somiah v Ramasubamma,

Table of Cases

- 554
- Kachapalava Gurukul v Subramania Gurukul, 402
- Kadar Nath v Suprava, 75
- Kaher Singh v Chanen Singh, 301
- Kailash Kumari v Manmohan Kapoor, 204
- Kailash Singh v Mewalal Singh, 295
- Kajal Chowdhury v Dilip Chowdhury, 171
- Kakali Das v Ashish Das, 96, 119
- Kalamati v Ratan Chand, 573
- Kalamma v Veeramma, 454
- Kalawatibai v Soiryabai, 389
- Kaliammal v Andiammal, 399.
- Kaliammal v Ardiammal, 388
- Kalla Maistry v Kanniammal, 579
- Kallan v Kallan, 105, 107
- Kallu v Kausilia, 97, 103
- Kalu v Nand Singh, 301
- Kalyan Singh v Tej Kaur, 273
- Kamal Kumar v Kalyani, 124
- Kamal Mazumdar v Usha Chaudhury, 453
- Kamal v Ramchandra, 205
- Kamala Nair v Narayanan Nair, 277
- Kamala v Ochhavlal, 385
- Kamaladevi v Shivakumaraswami, 65
- Kamalakar Sambhus v Tejas Sambhus, 268
- Kamalakshmi Amma v Bhaskara Menon, 484
- Kamalamma v Laxminarayan, 488
- Kamalaranjan Roy v Secretary of State, 20
- Kamalbai v Ramadas, 270
- Kamamma v Appanna, 505
- Kamarsu Rao v Nagabhushanam, 496
- Kameshwaramma v Subramanayam, 592
- Kameshwararao v Vasudevrao, 423, 424
- Kameswara Rao v Jabilli, 108, 109
- Kamla Devi v Amar Nath, 118
- Kamla Sindhi v Shama Sindhi, 230
- Kamladevi v Shivakumar Swamy, 120
- Kamlesh Arora v Jugal Kishore Arora, 241
- Kamta Prasad v Om Wati, 267
- Kanahaya Lal v Jumna Devi, 316, 323
- Kanchan Devi v Pramod Kumar, 96
- Kanchan Gauri v Chandulal, 63
- Kanchan Mohanty v Kulamani, 163
- Kanchan v Akash, 526
- Kanchan v Tarini, 389
- Kangal v Atwariya Devi, 595
- Kangavalli v Saroja, 58, 175
- Kanna v Krishnaswami, 65
- Kansirlal Pramanik v Pushparani Pramanik, 576
- Kanthimathi v SP Iyer, 574
- Kanthimathinatha v Vayyapuri, 391, 392
- Kantibai v Kamal Singh, 274
- Kanwal Ram v Himachal Pradesh Administration, 180
- Kanwarlal v Amar Nath, 20
- Kapur Kaur v Kishan Singh, 595
- Karabi Das (Smt) v Paritosh Das, 61
- Karapaya v Mayandi, 100
- Karivva v Hanumantappa, 454
- Karnail Singh v Bhupinder Kaur, 65
- Karni v Amru, 400
- Kartar Singh v Surjan Singh, 528, 548
- Kartik Chandra v Manjurani, 142
- Karuna v Jiwan Prakash, 127
- Karunakar Rout v Golak Biswal, 448
- Karuppa Gounder v Palaniammal, 319
- Karuppena v Chinna Nachammal, 585
- Kashinath Prasad v Kharannath, 322
- Kashinath v Dharamnath, 323
- Kashiram v Bhurelal & ors, 400
- Kastoori Devi v Chiranji Lal, 275
- Kastura Sahuni v Das Seth, 323
- Kaur Singh v Jaggar Singh, 301
- Kausalyabai v Devkabai, 344, 361
- Kaushala Devi v Mst Ram, 240
- Kaushalya Devi v Masta Ram, 224
- Kaushalya v Lal Chand, 189
- Kaushalya v Wisakhi Ram, 108
- Kaveri Amma v Parameswari Amma, 595
- Kedarnath v Gonesh, 30
- Kemp v Kemp, 220
- Kempanna v Shantarajiah, 402
- Kempiah v Girigamma, 334, 392
- Kenchava v Girimallappa, 456
- Kesarbai v Haribhau, 573

Table of Cases

- Kesharbai v State of Maharashtra, 300, 382, 396
- Keshavrao v Nisha, 105
- Keshri Lodhi v Harprasad, 415
- Key v Key, 224
- Khadal Penthi v Hulash Dei, 566
- Khagendra Nath v Karunadhar, 460
- Khageshwar v Domuni, 390
- Khan Gul v Lakha Singh, 20
- Khanindra Das v Kusum, 128, 236, 265
- Kharaiti Lal v Pushpa Rani, 193
- Khazam Singh v Union of India, 551
- Khiteshwar v Sowala, 54
- Khorshed v Muncherji, 123
- Kimti Lal v Indu Kundra, 158
- King v King, 108, 112, 118
- Kiran Bala v Ashok Kumar, 555
- Kiran Bala v Bankim Chandra Saha, 572
- Kiran Bala v Bhaire Prasad, 86
- Kirit v Praful, 162
- Kirpalani v Kirpalani, 150
- Kirpo v Bakhtawar Singh, 399, 401
- Kirshni Devi v Tulsan Devi, 49
- Kisan Memane v Suresh Memane, 555
- Kishan Dutt Verma v Baby Parul, 578
- Kishan v Hari, 396
- Kishore Sahu v Snehaprabha Sahu, 82
- Kishori Bala v Tribhanga, 412
- KM Raghothaman v MP Kannappan, 322
- Knott v Knott, 116
- Kochuni v States of Madras & Kerala, 329
- Kochunni v Kuttanunni, 326, 329
- Koduri Venkata Subbaiah v Rangaiah, 387
- Kohli v Kohli, 118
- Kondamma v Scthamma, 592
- Kondamudi v Myneni, 504, 505
- Kondiba Papali v Narayan, 544
- Kondol Row v Swamulavaru, 147
- Kota Varaprasad Rao v Kota China Venkaiah, 402, 584
- Kothawale v State of Maharashtra, 461
- Kotturuswami v Veeravva Jagannathan Pillai, 386
- Kotturuswami v Veeravva, 385, 386, 392
- KR Manjunath v Veena, 119
- Krishan Aiyar v Balammal, 66
- Krishana Lal v Nitu, 129
- Krishana v State of Haryana, 364
- Krishenlal v Krishna, 173
- Krishna Ayyangar v Nalla Perumal, 21
- Krishna Bannarjee v Bhanu Bikash, 107, 108
- Krishna Chandra v Niramani, 355
- Krishna Das v Venkayya, 402
- Krishna Dassi v Akhil Chandra, 385, 387
- Krishna Devi v Addl Civil Judge, 61
- Krishna Khetrapal v Satish Lal, 272
- Krishna Lal v Sudarshan Kumari, 566
- Krishna Pillai v Subhadra Amma, 195, 278
- Krishna v Satish Lal, 163
- Krishnabai v Ananda, 562
- Krishnakant v Reena, 246
- Krishnakant Vyas v Reena, 570
- Krishnakumari v Vanalakshmi, 580, 595
- Krishnalal v Nitu, 129
- Krishnamurthy Rao v Kamalakshi, 163
- Krishnapad Roy v Parimal Chandra Saha, 447
- Krishnaswami v Krishnaswami, 181
- Krishnaswami v Ramesh Chandra, 183, 187
- Krushna Chandra v Nisamani Bewa, 431
- Krushna Chandra v Pradepta Das, 535
- Krushna Kahail v Narana, 546
- KS Lalithamma v NS Hiriyannaiah, 153
- KS Mohan v Sandhya Mohan, 487
- Kudeepudi Lakshmi v Krishna Vora, 256
- Kulbhushan v Raj Kumar, 589
- Kuldip Chand v Geeta, 253
- Kuldip Singh v Karnail Singh, 372, 393
- Kumar Jahagirdar v Chetna, 488
- Kumara Pillai v Kunjulakshmi Amma, 364
- Kumaraswami v DR Nanjappa, 392, 409
- Kumaraswami v Nanjappa, 347
- Kumarath Yasoda v Manathanath Narayanam, 273

Kunji Thomman v Meenakshi, 403
 Kuppasami v Authorised Officer, 381
 Kuppaswami v Alagammal, 133
 Kusa Paride v Baishnab, 481, 484
 Kusa Paridna v Baisheb, 504, 505
 Kusum Lata v Kampta Prasad, 61, 118,
 190, 195
 Kusumgowri v Umaben, 402
 Kusumkumari v Kusumkumari Jadeja,
 76
 Kutha Ammal v Lakshmana Nadar, 403
 Kuttan Unni v Kochunni, 329
 Kutumba Rao v Sesharatnammba,
 271

L

Lachaman Singh v Kirpa Singh, 412
 Lachhia v Ram Shankar, 401
 Lachhman v Thunia, 393
 Lachman v Meena, 126, 129
 Ladhi Bai v Thakur Shiriji, 387
 Ladhi Bai v Thakur Singh, 395
 Laisram v Ajmnam, 361
 Lajya Devi v Kamla Devi, 30, 47
 Lakshmamma v Thavayya, 76
 Lakshmi Ammal v Alagiriswami, 155
 Lakshmi Ammal v Ramaswami, 74
 Lakshmi Chand v Sukhdevi, 402
 Lakshmi Devi v Shankar Jha, 403
 Lakshmi Narasamba v J Sandranma,
 582
 Lakshmi Narayan Tudu v Smt Basi
 Majihan, 313
 Lakshmidhar Satapathy v Lingaraj
 Satapathy, 563
 Lal Chand v Kali Bai, 406
 Lalchand v Sushila, 388
 Lalit Mohan v Tripta Devi, 217, 253
 Lalita Ranga v Ajay Ranga, 158
 Lalitha Ubhyankar v Union of India,
 535, 536
 Lalithamma v Kannan, 155, 185, 224
 Lalji Maitra v Shyam Behari, 401
 Lallu Bhai v Nirmalaben, 271
 Lallubhai v Nirmalaben, 239
 Lang v Lang, 132
 Lata Kamat v Vilas, 172, 173, 274, 279
 Lata v Civil Judge, Bulandshahr, 240

Lataben v Yogenda, 235
 Latika Ghosh v Nirmal Kumar, 235
 Latta Prasad v Ganga Sahal, 509
 Lauder v Lauder, 113
 Lawson v Lawson, 117, 156
 Laxman Singh v Kesharbai, 187
 Laxman v Anusuyabai, 544
 Laxmappa v Balawa KT Chawadi,
 404
 Laxmi Devi v Babu Lal, 80
 Laxmi Devi v Surendra Kumar, 306,
 333
 Laxmi Mallik v Mayadhar Malik, 126
 Laxmi Narayan v Santhi, 48
 Laxmi Priya v Kamaprasad, 239
 Laxmi Sahuni v Maheswar Sahu,
 568
 Laxmi v Krishna, 590, 591
 Laxmi v Parameshwari, 328
 Laxmibai v Ayodhya Prasad, 232,
 233, 570
 Laxmibai v Laxmichand, 152
 Laxmibai v Limbabai, 174
 Lee Barber v Reynolds, 445
 Leela Devi v Manoharlal, 260
 Leela Joshi v Mahdeo, 161, 162
 Leela v RA Singh, 224
 Leela v Radhakrishnan, 278
 Leela v Sachendra, 102, 206
 Leelawati v Ram Sewak, 227
 Lewis v Lewis, 259
 LH Sugar Factories v Moti, 19
 LIC of India v Escorts Ltd, 20
 Lila Gupta v Laxmi Narain, 171, 172
 Lily Thomas v Union of India, 180
 Limba v Manikrao, 403
 Lindsay v Lindsay, 261
 Lipika Gupta v State of Bihar, 270
 Lissack v Lissack, 121
 Llewellyn v Llewellyn, 226
 Lohia Machine v Union of India, 19
 Lois Marie v Alexis Sarasamma, 295
 Lokeshwari v Srinivasa Rao, 274
 Lord Advocate v Stewart, 21
 Love Kumar v Sunita Puri, 240
 Loveden v Loveden, 98
 Lowndes v Lowndes, 222
 Lukai v Niranjana, 385

Table of Cases

M

- M D Gopalaiah v Usha, 544
- M Muthusami v Angammal, 404
- M Shanmugha Udayar v
Sivanandanam, 403
- M Vijayakumari v K Devabalan, 46
- Ma Hari v Director of Consolidation,
49
- Mackenzie v Mackenzie, 108
- Madambath v Devi, 445
- Madan Lal v Meena, 235
- Madan Lal v Santosh Kumari, 236
- Madan Mohan v Sarla Kohli, 65
- Madan v Chitra Manna, 117, 128
- Madhavan Balsundaram v
Sarasamma, 177
- Madhavasen Nair v Radhamony, 278
- Madhavi v Madhukar, 272
- Madhavikutty v Bhasker, 278
- Madhegowda v Ankegowda, 505, 506
- Madho Prasad v Shankuntala, 277
- Madhu Sood v Anil Kumar Sood, 159
- Madhubala v Arun Khanna, 488
- Madhuben v Mahendra, 240
- Madhukar v Bhima, 566
- Madhukar v Malti, 271
- Madhukar v Sarala, 152
- Madhusudan v Chandrika, 86
- Madicherla Venkataiahnam v
Siddani Palamma, 386
- Madila Jain v Lakshmi Jain, 252
- Maganlal v Bai Dahi, 88, 99
- Maganlal v Dahi, 97, 104, 193
- Mahabir Pandey v Sashi Bhusan, 385
- Mahadeo v Bensraji, 401
- Mahadeolal v Administrator-General, 19
- Mahalakshmi v Sham Rangini, 21
- Mahalaxmiamma v Radhakrishna
Rao, 267
- Mahalingam v Kannayyan, 544
- Mahanti v Oluru, 452, 454
- Maharajan v Sarojini, 268
- Mahendra Kumar v Snehalata, 240
- Mahendra Mahanta v Tarini Devi,
454
- Mahendra Manilal Nanavati v Sushila
Mahendra Nanavati, 88
- Mahendra Nanavati v Sushila
Nanavati, 88, 102
- Mahendra v Sushila, 208, 212
- Mahesh Sharma v Raj Kumari, 389
- Mahila Ramjanki v Pavan Sharma, 127
- Mahindero v Kartar Singh, 408
- Mahmad v Bainabai, 562
- Mahuva Biswas v Swagata Biswas, 256
- Malabar and Aliyasanthanam, 329
- Mali Bewa v Dodhi Das, 400
- Malkan Rani v Krishan Kumar, 191,
240
- Mallappa v Mallava, 272
- Mallappa v Neelawwa, 62, 135
- Mallappa v Shivappa, 412
- Mallikarjun Rao v Siva Sankara
Prasad, 450
- Mamta Gupta v Mukand Kumar
Gupta, 198
- Man Mohan Battacharjee v Bidhu
Bhushan, 497
- Mangal Singh v Rattno, 387
- Mangala v Jayabai, 508
- Mangat Mal v Punni Devi, 404
- Mangla Balmukund v Nathiya, 392
- Manglabai v Deorao, 139
- Mango v Prem Chand, 65
- Mani Shankar v Radhadevi, 205
- Manik Chand v Ramachandra, 495
- Manilal v Gangaben, 208
- Manjit Kaur v Gurdial Singh, 190, 196
- Manjit Kaur v Surinder Singh, 80
- Manjit Singh v Savita Kiran, 244, 262
- Manju Singh v Ajay Bir Singh, 227
- Manju Tiwari v Rajendra Tiwari, 486,
509
- Manjula v Zaverila, 63, 65
- Manmohandas v Bishun Das, 19
- Manmoyee Baramani v Upeswari, 387
- Manning v Manning, 213
- Manokaran v M Devaki, 238
- Manshan v Tej Ram, 300, 334
- Mantorabai v Parotanbai, 346
- Marjoram v Marjoram, 131
- Marudakkal v Arumugha, 385, 391, 392
- Maslin v Maslin, 218
- Master X v Y, 579
- Mc Pherson v Mc Pherson, 199

Table of Cases

- MD Gopalaiah v Usha, 554
 Meacher v Meacher, 107, 120
 Meena Deshpande v Prakash Deshpande, 233
 Meena v Anirudh Datta, 161
 Meenakshamma v MC Nanjundappa, 314, 408
 Meenakshamma v Nanjundappa, 344
 Meenakshi Ammal v PS Muthukrishna, 256
 Meenakshi Mehta v Atul Mehta, 119
 Meera v Ramesh Chand, 108
 Meera v Sukumar, 574
 Meera v Vijay, 119, 216
 Meganatha v Susheela, 167, 169
 Menokabala v Panchanan, 593
 Meyappa v Kanappa, 423
 Miller v Minister of Pensions, 98
 Millward v Millward, 196
 Milne v Milne & Fowler, 196
 Minakshi v Biresh Ranjan, 116
 Minarani v Dasarath, 248, 250
 Minto v Sushil Mohan Singh Malik, 457
 Mira Bose v Santosh Kumar, 271
 Mirapala Venkata Ramana v Mirapala Peddaraju, 120
 Mirchumal v Devi Bai, 63
 Mita Gupta v Prabir Kumar Gupta, 152
 MK Malhotra v Kirti Malhotra, 118
 Modan Singh v Sham Kaur, 562
 Modilal Jain v Lakshmi Jain, 249, 252
 Mohadevappa v Gauramma, 431
 Mohan Lal v Shanti Devi, 62
 Mohan Rani v Mohanlal, 271
 Mohanlal v Mohan, 211
 Mohanmurari v Kusumkumari, 172
 Mohari v Chukli, 383, 390
 Mohindar Kaur v Narindar Singh, 99
 Mohinder Kaur v Bhag Ram, 118
 Mohinder Kaur v Major Singh, 43, 49
 Mohinder Pal v Kulwant Kaur, 225
 Mohinder Singh v Harbans Kaur, 139
 Mohini v Virendra Kumar, 486, 488, 509
 Mohamed Ibram v State of Uttar Pradesh, 46
 Moina Khosla v Amardeep Khosla, 23
 MoLaughlin v Westgarth, 276
 Mona Goel v Aresh Goel, 158
 Monia Khosla v Amardeep Khosla, 79
 Monika Das Gupta v Promode Kumar, 187
 Monoj Kumar Jaiswal v Lila Jaiswal, 240
 Montorabai v Paretanbai, 455
 Mookkammal v Chitravadevammal, 454
 Mool Kanwar v Jeewalal, 403
 Moolchand v Amritbai, 544, 548
 Moonshe Buzloor Ruheem v Shumsoonissa Begum, 59
 Moreno v Moreno, 220, 224
 Morgan v Morgan, 210
 Moti Lat v Sardar Mal, 555
 Motilal v Padmaben, 150
 MSBY Board v Subramania, 469
 MSCO Pvt Ltd v Union of India, 22
 Mst Butti v Gulab Chand, 135
 Mudge v Mudge, 213
 Muhammad v Comm of Income-tax, 19
 Mukan Kanwar v Ajit Chand, 235, 236
 Mukesh v Deonarayan, 495
 Mukhtiar Kaur v Kartar Kaur, 390
 Mukta Bai v Kamlaksha, 582
 Mukta Jesing v Vallabhadas, 180
 Mukund Singh v Wazir Singh, 555, 556, 558
 Mummery v Mummery, 135, 218
 Munesh v Anasuyama, 162
 Muniammal v Raja, 592
 Munimajappa v R Manual, 400
 Muniratnam Naidu v Shantamma, 234
 Munirswamy v Hamsa Rani, 249
 Munishwar Datt v Indra Kumari, 143
 Muniswamappa v Eramma, 271
 Munnalal v Rajkumar, 300, 382, 388, 397, 415
 Munni Devi v Choti, 580
 Munni Kumari v Shailendra Chaudhary, 158
 Munnusami v Rajambal, 409
 Munshi Singh v Sohan Bai, 387
 Murahari Rao v Vasanta Manohari, 153
 Muralidhar v Bansidhar, 448
 Murlidhar v Yallappa, 495

Table of Cases

Murphy v Murphy, 186
Muthu Battar v Chokku Battar, 403
Muthusami v Masilamani, 27

N

N Nirmala v Nelson Jeyakumar, 266
N Nirmala v Nelson, 509
N Satyanarayana v M Veramuni, 62
N Sreepadachar v Vasantha Bai, 108
N Vijaya Raghavan v K Sharada, 164
Naganna v Lachmi Bai, 155
Nahar Hirasingh v Dukalhin, 303
Nalim v Velu, 239
Nalini Sunder v GV Sunder, 117
Nallan alias Keerimuthan v
Vellalyankudumban, 405
Nallan v Vellaiyankudumban, 391, 392
Namdev Ghadge v Chandrakant
Ghadge, 555
Namichand Patni v Basantbai, 544, 548
Namo Devi v Rattan Chand, 402, 403
Nanak Singh v Chhindo, 403
Nand Singh v Nachhatar Singh, 403
Nandarani v Indian Airlines, 249, 252
Nandeni v Sanju, 267
Nandini v Lakshminarayan, 505
Nandkishore v Munnibai, 86, 88, 89
Nanigopal v Renubala, 263
Nanjappa v Vimal Devi, 230
Nank Chand v Chandra Kishori, 529
Narain Khanman v Parshuman
Kumar, 21
Narain Singh v Rukmani, 271
Naraini Bai v State of Haryana, 344
Narasimha Murthi v Susheelabai, 454
Narasimhachari v Andalammal, 382, 388
Narayan Bal v Sridhar Sutar, 507
Narayan Gilankar v Udayakumar, 494
Narayan Prasad v Mutuni Kohain, 322
Narayan Prasad v Prabhadevi, 131
Narayan v Tara, 402
Narayanan v M Parukutty, 205
Narayanan v Pushparajini, 440
Narayanaswami v Padmanabhan, 246
Narayanbal v Sridhar Sutar, 494
Narayanrao v State of Maharashtra, 382
Narendra Kumar v Indu, 118
Narendra Kumar v Saroj, 241

Narendra Nath v Sudarshan Sekhar, 187
Naresh Jha v Rakesh Kumar, 387
Naresh Kumar v Sakshi Lal, 405
Naresh v Ichrabai, 563
Narian Singh v Sapurna Kuer, 486
Nathulal v Mana Devi, 249, 252, 261
Nathuni Mishra v Mahesh Mishra, 494
Nathuni Missir v Ratna Kuer, 334, 392
Nathuni Prasad v Kacher, 531
Nathuni Prasad v Kachnar, 390
Naumi v Narotam, 49
Naval Kishore Somani v Poonam
Somani, 120
Nazar Singh v Jagjit Kaur, 404
NC Das v Chinmayee Das, 97, 101
Neelam Kumari v Gurnam Singh, 115
Neelam Malhotra v Rajinder
Malhotra, 258, 566
Neelam Malhotra v Rajinder, 233, 237
Neelam Singh v Narain Singh, 568
Neelamma v Basappa, 316
Neelanga v Ramaswami, 316
Neelawwa Tarapur v Divn, 56
Neelawwa v Shivwwa, 336
Neelu Kohli v Naveen Kohli, 106
Neeta Desai v Bino Samuel, 95
Nepra v Sayer, 18
Niblett v Niblett, 117
Nidhi Swain v Khati Debya, 303
Nighawan v Nighawan, 80
Nijhawan v Nijhawan, 116, 224
Nilima Mukherjee v Kanta Bhushan
Ghosh, 548
Nimbamma v Rathnamma, 47
Ninnoo v Nikka Ram, 155
Niranjan Singh v Gurudev Kaur, 126
Nirmal Dev v Ramdas, 235
Nirmal Jain v State, 509
Nirmala Devi v Ram Dass, 235
Nirmala Devi v Ved Prakash, 217
Nirmala Gupta v Ravendra Kumar, 267
Nirmala Jagesha v Manohar Jagesha,
105, 119, 122
Nirmala v Narasimha, 222
Nirmala v Rukminibai, 56
Nirmoo v Nikka Ram, 224
Nishat Karimi v Iftekhkar Karimi, 262
Nishit Kumar v Anjali, 88

Table of Cases

Nitu v Krishnalal, 95, 129
 Norendra Nath v Kamalabasini, 21
 Noronha v Noronha, 196
 NR Gopal v KG Banumathi, 244
 NR Radhakrishnan v N
 Dhanalakshmi, 63
 NR Trivedi v DEO Anand, 562
 Nursing Charan v Hemant Kumari, 272
 Nuttley v Nuttley, 128

O

Om Meyyappa v Kannappa, 424
 Om Pati v Rajvir, 118
 Om Prakash v Prabha, 125
 Om Prakash v Shreshta Devi, 129
 Om Vati v Kishen Chand, 130
 Onkar Walia v Urmila Devi, 486
 OP Mehra v Saroj Mehra, 153, 211
 Osmania University Teachers' Assn v
 State of Andhra Pradesh, 18, 19
 Over v Over, 101

P

P Govinda Reddy v Golla
 Obulamma, 316, 322
 P Kalyanasundaram v K
 Paquialatchamy, 126, 129
 P Kamaraju v C Gunaya, 497
 P Madhavan Nair v K Ravindran, 265
 P Mariammal v Padmanabhan, 278
 P Radhakrishna Muthy v
 Vijayalakshmi, 65
 P Rameswara Rao v I Sanjeeva Rao,
 402
 P Shankar v P Vasanthi, 250
 P Srinavasa Rao v P Indira, 566
 P v K, 80, 81, 86
 P v P, 130
 P Venkataramana v State, 49
 Pachi Krishnamma v Kumaran
 Krishnan, 405
 Packai Raj v Subbamma, 56
 Padma Rao v Swarajya Lakshmi, 168
 Padma Vati v Dasaundhi Ram, 402
 Padmavathy v Laxminarayana, 237
 Palak Dhari v Dy Director of
 Consolidation, 303

Palani Goundan v Vanjiakkal, 497
 Palaniappa v Nallappa, 497
 Palchuri Hanumayamma v Tadi
 Kamalla Kotalingam, 403, 486
 Palmer v Palmer, 121
 Pancharan Samanta v Laxmi Mandal,
 404
 Panditrao v Gayadabai, 252
 Panditro Kalure v Gayabai, 565, 568
 Pandurang v Sindhu, 390
 Panmato v Ram Agya Singh, 86
 Panna Lal v Fulemoni, 584
 Pannalal Bansilal v State of Andhra
 Pradesh, 181
 Pannou v Makroli Ram, 190
 Panthaky v Panthaky, 185
 Paramjit Singh v Prabjot Kaur, 490
 Paras Ram v Janki Bai, 273
 Parashuram v Pratibha, 271
 Parasuraman v Purushothaman and
 Co, 443
 Parbati Debi v Harvindra Singh, 181
 Parchuri Rajya Lakshmi v Parchuri
 Viswa Sankara, 235
 Pardy v Pardy, 129
 Parkash Chand Gupta v Kamla
 Gupta, 196
 Parkash Chander v Parmeshwari, 46
 Parkash Kaur v Harbhajan Das, 100
 Parkinson v Parkinson, 147
 Parul Bala v Bangshdar, 595
 Patala Atchamma v Patala
 Mahalakshmi, 97, 103
 Pathumma Beebi v Krishna Asari,
 390, 406
 Pattabhiraman v Parijatam Ammal,
 399, 402
 Pattayee Ammal v Manickam, 97, 98,
 104
 Pauline Lucas v Jerome Pascal, 295
 Pawan Kumar v Chancha, 96
 Pawan Kumar v Mukesh Kumari, 88
 Peethambaram v Lakshminarayana,
 505
 PEK Kalliani Amma v K Devi, 175
 PEK Kalliani v K Devi, 73
 Pentapati Chitty Mahalakshmi v G
 Subba Rao, 301

Table of Cases

- Perminder Charan Singh v Harjit Kaur, 87, 125
 Perminder Lal v Suman Lata, 265
 Perry v Perry, 128, 136, 140, 215, 221
 Phankari v State, 180
 Phillips India Ltd v Labour Court, 20
 Phulmani v State, 301
 Pike v Pike, 63, 132, 133, 138
 Piyush Rastogi v Archana Varshney, 120
 PL Sayal v Sarla Rani, 108
 PL Singh v MM Singh, 277
 Polestar and Co v Addl Sales-tax Comm, 18, 20
 Polestar Electronic Pvt Ltd v CST, 19
 Popuri Sunita Lakshmi v Srinivas, 114
 Pothu Raju v Rodha, 62
 Potter v Potter, 82
 Powell v Kepton Park Race Course Co, 18
 PR Nayak v Union of India, 19
 Prabhavati v Somasankar, 133
 Pradeep Kumar v Dalimla, 61
 Pradeep Kumar v Shilaja, 232
 Prakash Chand Sharma v Vimlesh, 172
 Prakash Kaur v Harjindal Pa, 120
 Prakash Singh Thakur v Bharati, 87
 Pramatha Maity v Ashima, 142
 Pramesh Babu v Usha, 231
 Pramila Bhatia v Vijay Kumar Bhatia, 111, 238
 Pramilabala v Rabindranath, 65
 Pramod Sharma v Radha, 172
 Pranab Biswas v Mrinmayee Dassi, 89
 Prasana Kumar v Sureswari, 236
 Pratap Singh v Union of India, 378
 Pratapi v Balakrishna, 532
 Pratibha Rani v Suraj Kumar, 267, 268
 Pratima Biswal v Amulya Kumar Biswal, 127
 Pratt v Pratt, 124, 129, 131
 Praveen Kumari v Manmohan Kumar, 48
 Praveen Mehta v Indrajit Mehta, 96, 115, 118
 Pravina Ben v ST Arya, 63
 Prayavati Mehta v Priyanath Mehta, 197
 Preeti Archana v Ravindra Kumar, 237, 259
 Prem Nath v Prem Lata, 234, 237
 Prem Singh v Dulhari Bai, 24
 Prema Devi v Joint Director of Consolidation, 303, 380
 Prema v Ananda Shetty, 278
 Premchand Pandey v Savitri Pandey, 120
 Premchand v Bai Galal, 189, 219
 Premi v Doya, 49
 Preston Jones v Preston Jones, 88, 99, 205, 207, 211
 Price v Price, 133, 137
 Prichard v Prichard, 254
 Priday v Priday, 122
 Pritam Singh v Asst Controller of Estate Duty, 301
 Pritam Singh v Bachan Kaur, 400
 Pritam Singh v Rajinder Kaur, 240
 Prithvirajsinghi v Shivprabhakumari, 271
 Priti Parihar v Kailash Singh, 271
 Priti v Kailash, 241
 Pritikona Banerjee v Rabi Shankar Banerjee, 197
 Pritipal Singh v Union of India, 19
 Pritma Sharma v Mohinder S Bharadwag, 185
 Priya Bala v Suresh Chandra, 46, 54, 180
 Promod Naik v Sukanti Naik, 64
 Pronab Kumar v Krishna, 84, 142
 PS Devarajan v R Geetha, 191
 PS Krishnamurthy v PS Umadevi, 232, 236
 PT Chathu Chattiar v KK Kanahan, 505
 Pulford v Pulford, 123
 Pullaiah v Rushingamma, 133, 135
 Punithavalli Ammal v Ramalingam, 300
 Punithavalli v Ramalingam, 378
 Punithavelli Ammal v Ramalingam, 396
 Punjab Beverages Pvt Ltd v Suresh Chand, 19
 Purabi v Basudeb, 85
 Puran Chand v Kamala Devi, 241
 Purna Chandra v Nimai Charan, 388, 401

Purnabasi v Supha Devi, 453, 454
 Purshottam v Shripad, 440
 Purton v Purton and George, 224
 Purushotam v Devki, 250
 Purushottam Das v Pushpa Devi, 241
 Pushpa Dutt Mishra v Archana
 Mishra, 118, 184, 272
 Pushpa Rani v Asanand, 236
 Pushpa Rani v Vijay Pal Singh, 63
 Pushpadevi v Radhey Shyam, 187
 Pushpalata v Damodar, 163
 Pushpatti Nath v Ravi Prakash Gaur,
 351
 Puthiyadath Jayamathy Avva v KJ
 Naga Kumara, 334
 Putul Devi v Gopi Mandal, 108
 PVP Sarma v Seshalakshmi, 62

R

R Deivanai Ammal v G Meenakshi
 Ammal, 452
 R Muraliraj v R Ramaraj, 496
 R Suresh v Chandra, 232
 RA Missir v Raghunath, 384
 Rabindra Kumar v Prativa, 180
 Rabindra Nath Dutt v State, 180
 Rabindra Nath v State, 55
 Rabindra Prasad v Sita Devi, 196
 Rabindranath v Pramila Bala, 65
 Radha Prasad v Gajadhar Singh, 274
 Radha Rani v Hanuman Prasad, 385,
 392
 Radha v Rangappa, 487
 Radhabai v SK Mudaliar, 488
 Radhakrishana v Shayam Sundar, 546
 Radheshyam v Laxmi Bai, 242
 Radhey Krishan v Shiv Shankara, 392
 Radheyshyam v Kiran Bala, 496
 Raghavan Nair v Lakshmikutty
 Ammal, 484
 Raghawan v Nagammal, 595
 Raghbir Singh v Satpal Kaur, 148
 Raghumull v Official Assignee of
 Calcutta, 21
 Raghunandan v Rambalak, 451
 Raghunath Prasad v Urmila, 227
 Raghunath v Bhimsen, 388, 401
 Raghunath v Vijaya, 86, 89
 Raghuvar v Janki Prasad, 422, 428
 Raghuvir Kumar v
 Shanmughavadinu, 56
 Raghuwar v Janki Prasad, 423
 Raghvendra Singh v Seemabai, 242
 Rahasa Pandiani v Gokulananda, 563
 Raj Bala v Pramod Kumar, 273
 Raj Kishore Mishra v Meena Mishra,
 577
 Raj Kumari v Nandlal, 118
 Raj Mal v Harnam Singh, 21
 Raj Rani v Chief Settlement
 Commissioner, Delhi, 317, 334
 Raj Rani v Harbans Singh, 227, 228
 Raja Gopalan v Rajamma, 255
 Raja Man Singh v Ramvishal, 323
 Rajagopal Chettiar v Mamasaveni
 Ammal, 400
 Rajagopalan v Kamalammal, 252
 Rajalakshmi v Ramachandran, 483,
 504, 505
 Rajalingam v Lingayya, 194
 Rajamma v Krishnama, 187
 Rajan Revankar v Shobha, 96, 106
 Rajani v Prabhakar, 97, 104
 Rajarain v Deepabai, 86
 Rajathi v C Ganesan, 575
 Rajdei v Lautan, 55
 Rajender Parkash v Roshni Devi, 255
 Rajender Parshad v Shanti Devi, 81
 Rajendra Kumar v Kalyan, 537
 Rajendra Nath v Shiv Nath, 387
 Rajesh Bai v Shanta Bai, 74, 247
 Rajinder Parkash v Roshini Devi, 261
 Rajinder Singh v Ponilla, 87
 Rajinder v Anita, 95, 116, 118
 Rajkumar v Anjana Kumari, 229
 Rajkumari v Triloh Singh, 230
 Rajneesh v Savita, 95
 Rajpal v Dharmanati, 269
 Rajshree v Principal Judge, 186
 Raju Abral v Adarsh Abral, 241
 Rajula v Suka, 74
 Rakesh Sharma v Surbhi Sharma, 118
 Rali Ram v Shiv Charan, 469
 Ram Chander Lamba v Adarsh
 Lamba, 125
 Ram Chander v Ganesh Das, 389

Table of Cases

- Ram Ghulam Singh v Palakdhari Singh, 390
- Ram Jag v Director of Consolidation, 403
- Ram Jagat v Kanohandevi, 562
- Ram Jog v Director of Consolidation, 402
- Ram Kali v Gopal Das, 152
- Ram Kali v Sohan Lal, 415, 430
- Ram Kotari v Prakashwati, 412
- Ram Kumar v Nirmala Devi, 233
- Ram Kumar v Raksha, 104
- Ram Kumari v Meenaketan, 273
- Ram Lakhan v Prem Kumari, 119
- Ram Narain v Darupadi Devi, 191
- Ram Pal v Ajit Kaur, 187
- Ram Pal v Nisha, 196
- Ram Parkash v Savitri Devi, 573
- Ram Piary v Piara Lal, 252
- Ram Prasad v State of Uttar Pradesh, 42, 47
- Ram Pyari v Dharam Das, 74
- Ram Rakhi v Ammar Nath, 390
- Ram Saran v Bhagwat Prasad, 22
- Ram Sarup v Patto, 402
- Ram Sarup v Toti, 401
- Ram Singh v Sushila Bai, 180
- Rama Ananda v Bhima, 415
- Rama Kanta v Ashok Kumar, 197
- Rama Kanta v Mohinder, 119
- Ramabai Patil v Rukminibai Vekhande, 344
- Ramabai v Ambadas, 529
- Ramabai v Narayana Rao, 585
- Ramachandra v Annapurni Ammal, 483, 484
- Ramakant v Dy Director of Consolidation, 303
- Ramakanta v Mohinder, 87
- Ramamoorthy v Sitharamamma, 529
- Ramanathan v Palaniappa, 502
- Ramanna Gowda v Shankarappa, 563
- Ramanna Rai v Jagannatha, 300
- Ramappa v Bojjappa, 191
- Ramappa v Gourwwa, 595
- Ramarao v PR Krishnamani, 65
- Ramasay v Ramsay, 254
- Ramaswamy v Baghyammal, 594, 595
- Ramavtar Verma v Chintamani, 242
- Ramchandra Rao v Kowsalya, 191
- Ramchandra v Baburao, 544
- Ramchandra v Sakharam, 385
- Ramchandra v Savitribai, 397
- Ramchandra v Snehalata Dei, 566
- Ramchandra v Srideviamma, 393
- Ramdas Menon v Sreedevi, 495
- Ramesh Chander v Saroj Kumari, 152
- Ramesh Chander v Veena Kausal, 234
- Ramesh Chandra Daga v Rameshwari Daga, 47, 75, 248, 571
- Ramesh Chandra v Veena Kausha, 18
- Ramesh v Rajpati, 73
- Rameshwar Nath v Kanta Devi, 230
- Rameshwar v Hardas, 384
- Rameshwaridevi v State of Bihar, 175
- Ramji Singh v Chhulghana Kuer, 272
- Ramkali v Mahila Shyamvati, 175, 339
- Ramlal Agarwal v Shantadevi, 55
- Ramlali v Bhagwanti Bai, 301
- Ramnarain v Rameshwari, 122
- Rampali Devi v Chando Bibi, 406
- Ramsaroop v Hiralall, 384
- Ramsay v Boyle, 193
- Ramshanker Rastogi v Vinay Rastogi, 263
- Ramulu v Narayana, 393
- Rangabhattar v C Choodamani, 88
- Rangamma v Annapurnamma, 423, 442
- Rangamma v Venkatarajalu, 592
- Ranganathan v Annamalai Chettiar, 314
- Ranganathan v Shyamala, 250
- Ranganayakamma v Rajeshwaramma, 388
- Ranganayakiammal v R Srinivasaraghavan, 403
- Rangaswami v Chinnammal, 382, 387
- Rangaswamy v Nagamma, 89
- Rangubai v Laxman, 316
- Rani Bala Debnath v RK Debnath, 86
- Ranjibhai v Shantaben, 273
- Ranjit Bhattacharya v Sabita, 570
- Ranjit Rai v Chitralkha, 232
- Ranjit Sahu v Nilambar, 563
- Ranjit Singh Dhillon v Punjab School Education Board, 562

- Rasala Suryaprakasarao v Rasala Venkateshwararao, 299
 Raspin v Raspin, 99
 Ratan Malla v Sefali Malla, 274
 Ratan Moni Devi v Nagendra Narain, 78, 80
 Ratan v Bisan, 483
 Ratansi v AG of Madras, 27
 Ratnamala v State of Mysore, 328
 Ratnaprabha v Shadoksharaih, 253
 Ratnaprabhabai v Sheshrao, 63
 Ratneshwari Nandan v Bhagwati Saran, 84
 Ratni Bai v Man Kuwar, 346
 Rattan Prakash v Bela Sihare, 412
 Ravamma v Shanthappa, 80
 Ravee Saharawat v Ujjawal Sahrawat, 233
 Ravi Keshri v Krishna Gupta, 490
 Ravi Saran Prasad v Rashmi Singh, 242
 Ravi Singhal v Monali Singhal, 244
 Ravindra v Pratibha, 190
 Ravishankar v Sharda, 161
 Rebarani v Ashit, 63
 Remani Menon v KG Omnakuttan, 232
 Renu Jain v Mahavir Prasad, 236
 Renu v Sanjai Singh, 96
 Renu Vaid v Rami Vaid, 488
 Renukha Bala v Aswini Kumar, 334, 410
 Renulu Bose v Manmatha Nath, 20
 Restall v Restall, 261
 Revabai v Sitaram, 398
 Revanna v Suseelamma, 65, 156
 Reynold Rajamani v Union of India, 18
 Reynolds Rayamani v Union of India, 207
 Richardson v Richardson, 220, 221
 Richmond v Richmond, 213
 Rita Roy v Silesh Chandra, 142
 Rita v Brij Kishore, 218
 Robey v Robey, 185
 Rohini Kumari v Narendra Singh, 16, 40, 126, 135, 568, 573
 Rohit Dandekar v Raj Kavitha, 266
 Romesh Chander v Savitri, 96
 Ronalds v Ronalds, 232
 Roomal v Srinivas, 495
 Roopa Reddy v Prabhakar, 164
 Rosa Marie v Commr of Wealth Tax, 27, 294
 Rosa Marie v Wealth Tax Commr, 307
 Rose v Rose, 236
 Roshan Lal v Dalipa, 415
 Roshan Lal v Kadembari, 48
 Ross & Co v Scriven, 189
 Rosy Jack v Jacob, 486
 Rousseau Mitra v Chandana Mitra, 237
 Rukhmanibai v Kishanlal, 271
 Rukhmini v Srinivasa, 224, 226
 Rumbelow v Rumbelow and Hadden, 213
 Rundibala Roy v Putubala, 565
 Rup Lal v Kartar Devi, 113
 Russell v Russell, 60, 105, 107, 206, 208, 244
 Rutherford v Richardson, 101
- S**
- S Chellarijan v S Sathiakrishnan, 579, 583
 S Hanumantha Rao v Ramini, 120
 S Jayakumari v S Krishnan Nair, 64
 S Nagalingam v Sivagani, 57
 S Narasimha v Vijayabai, 72
 S Narayan Reddy v Sai Reddy, 463
 S v R, 224
 S v S, 81
 Sabitanajli v Priyabrata, 96
 Sachchanand v Nisha, 577
 Sachindra Nath v Banamal, 255
 Sachindranath v Nilima, 204, 205, 207
 Sadan Singh v Resham, 148
 Sadanand v Sulochana, 251
 Sadhu Singh v Jagdish Kaur, 65
 Sahyogata Devi v Lalit Kumar, 190
 Saila Bala Dasi v Saila Bala, 389
 Sakarappa Gounder v KC Gopalan, 329
 Sakharam v Sheria, 493
 Sakri v Chhanwarla, 227
 Salam v Sant Singh, 49
 Samar Som v Sadhana Som, 80
 Samar v Snigdha, 78, 79, 81
 Sambireddy v Jayamma, 72, 179
 Sambit Parija v Surita Parija, 234

- Sameeran Roy v Leena, 229
 Sampath Kumari v Lakshmiammal, 304, 334, 387, 398, 399
 Samraj Nadar v Abraham, 133
 Samu Bai v Magan Lal, 577, 580
 Sandara v Girija, 328
 Sandeep Kumar v State of Jharkhand, 234
 Sandhya v Gopinath, 229, 250
 Sandhya v Salil Chandra, 67
 Sangawwa v Shankarappa, 264
 Sangeeta v Balkrishna, 250, 267
 Sangita v Sanjay Bansa, 268
 Sanjay v Eveline Jobe, 55
 Sanjeev Prashar v Mithilesh Kumar, 98
 Sanjukta Pradhan v Laxminarayan Pradhan, 98
 Sankar Prasad v Ushabala, 385, 390
 Sankara Prasad v Madhabi Paul, 190
 Sankara Rao v Rayyalakshamma, 388
 Sankreribala v Asita Barani, 585
 Sansir Patelin v Satyabati Naikani, 385, 391
 Sant Kumar Agarwal v Nandini Agarwal, 125
 Sant Ram Dass v Gurdev Singh, 306
 Santana Banerjee v Sachindra Nath Banerjee, 119, 218
 Santaram v Hirabai, 250
 Santha v Cherukutty, 496
 Santhakumari v Natarajan, 486
 Santhanam v Subramania, 402
 Santhanam v Subramanya, 402
 Santosh Kumar v Chandra Kishore, 553
 Santosh Kumar v Surjit Singh, 47
 Santosh Kumari v Chaman Lal, 271
 Santosh Kumari v Kewal Krishan, 152
 Santosh Kumari v Mohanlal, 152
 Santosh Kumari v Om Prakash, 185
 Santosh Kumari v Shiv Prakash, 140
 Santosh v Ashok, 94
 Sanubai v Bala, 422
 Sapna Jacob v State of Kerala, 27
 Sapsford v Sapsford, 97
 Sarada v Chakkunny, 351
 Saraswathi Ammal v Anantha, 403, 406
 Saraswathi Ammal v Krishna Iyer, 388
 Saraswathi Ammal v Lakshmi, 158
 Saraswathi v Anantha, 388
 Saraswathy Amma v Padmavati, 278
 Saraswati Devi v Nandan, 190
 Sarat Lakshmi Deb v Sisir Kumar Deb, 403
 Sardar Bhupendra Singh v Jasbir Kaur, 488, 509
 Sardar Surinder Singh v Manja Kaur, 267
 Sardari Lal v Vishano, 255
 Sareeta v Venkatasubiah, 60
 Sarla Devi v Balwan Singh, 271
 Sarla Mudgal v Union of India, 180
 Sarla v Krishan Chandra, 133
 Sarla v Shakuntala, 193
 Sarlabai v Komal Singh, 83, 95
 Saroj Rani v Sudarshan Kumar, 60, 190
 Saroja v Emannual, 185, 186
 Sarwan Singh v Dhan Kaur, 440
 Sasadhar v Tara Sandari, 398
 Sasank Bhawmik v Amiya Bhowmik, 396
 Sasanka Shekhar v Dipika, 87, 187
 Satish Bindra v Surjit Singh Bindra, 271
 Satish Chandra v Bagram, 295
 Satya Charan v Urmila, 357, 363
 Satya Devi v Ajaib Singh, 65
 Satya v Teja Singh, 157
 Satyabhama v Narendra, 162
 Satyanarain v Rameshwar, 323
 Satyanarayana v G Sithayye, 400
 Satyanarayana v Seethamma, 334, 388, 393
 Satyanarayana v Sithayaya, 402
 Satyanarayana v Veeramani, 229
 Satyanarayanamurthi v Jaggamma, 573
 Satyendra Narayan Singh v State of Bihar, 18
 Savithri v Mulchand, 119
 Savitri Amma v Devaki Amma, 315
 Savitri Pandey v Prem Chandra Pandey, 114, 134, 157, 273
 Savlaram v Yeshodabai, 89
 Sawan Ram v Kalawanti, 551
 Sawita Devi v Pran Nath, 165
 Sayal v Syal, 61
 Scott v Scott, 199, 204

- Sebati Baral v Dungal Baral, 532, 548
 Secretary of State v Bombay Municipality, 22
 Seema Shrinidhi v Praveen Kumar Tiwari, 197
 Seeta Ram v Phooli, 249, 252
 Seetharamaiah v Ramakrishnaiah, 457
 Seetharamayya v Peraiah, 400
 Sehadri v Jayalakshmi, 248
 Sellammal v Nellammal, 402
 Sen Mondal v Chanchal Dasi, 385
 Senat v Senat, 204
 Senior Superintendent RMS v Gopinath, 19
 Senthilkumar v Dhandapani, 468, 562
 Seshadri v Jayalakshmi, 260, 263, 271, 529
 Seshamma v Padmanabha Rao, 142
 Seshi Ammal v Thaiyu Ammal, 592
 Setty v Gyanchandrappa, 446
 Shah Bhojraj Oil Mills v Subhash Chandra, 276
 Shailappa v Muttaramma, 551
 Shakuntala Devi v Amar Nath, 49
 Shakuntala v Mahesh, 22, 267
 Shakuntala v Om Parkash, 119
 Shalu Sharma v Ajay Sharma, 273
 Shamsher Singh v Deputy Custodian General, 563
 Shankaramma v Medappa, 323
 Shankerappa v Sushilabai, 46
 Shankuntala Devi v Amar Nath, 83
 Shanta Bai v Tarachand, 82
 Shantadevi Pratapsingh v Sangramsingh Pratapsingh, 307
 Shantanand v Basudevanand, 21
 Shantaram v Dagubai, 177, 246, 299
 Shantaram v Hirabai, 250
 Shantaram v Malti, 252
 Shanti Dev Berma v Kanchan Prawa Devi, 55
 Shanti Devi v Balbir Singh, 65
 Shanti Devi v Govind Singh, 275
 Shanti Devi v Ramesh Chandra, 66, 225
 Shanti Nigam v Ramesh Chandra, 63
 Sharada v Dharampa, 48, 142
 Sharbati Devi v Hiralal, 403
 Sheel Wati v Ram Nandani, 74
 Sheela Rani v Jagdish Chander, 567
 Sheela v Jivanlal, 509
 Sheila v Soli Phirozshaw, 488
 Sheldon v Sheldon, 104, 116
 Sheoji v Prema Kuer, 403
 Sheokumar v Shiv Rani, 489
 Sheopujan v Ramsewak, 384, 391
 Sheoraj Singh v Munia, 334
 Sherwood v Sherwood, 259
 Shesh Narain v Savita, 273
 Shewanti v Bhawrao, 80
 Shewood v Sherwood, 259
 Shib Dai v Ghauri Lal, 388
 Shiv Charan v Ram Saran, 19
 Shiv Dass v Devki, 395
 Shiv Narain v Raji, 405
 Shiv Ratan Rai v Jamuna Misir, 402
 Shivadeviamma v Sumanji, 469
 Shivagonda Patil v Director of Resettlement, 313
 Shivamurthi v Vijayasing, 495
 Shivani Chattopadhyay v Siddarth, 118
 Shivram v Radhabai, 19
 Shoba v Janki, 500
 Shobha Rani v Madhukar Reddy, 107, 108
 Shrawan Kumar v Rita Devi, 138
 Shree Devi v Subhadra, 448
 Shrimant Rajmata Vijaya Raje Scindia v Jyotirdaya, 315
 Shrishailappa v Muthamma, 555
 Shrivallabh v Modani, 342
 Shukla v Brij Bhushan, 267
 Shusma Sharma v State of Rajasthan, 21
 Shyamati v Ashim Kumar, 250
 Siddagananganappa v R Shailaja, 117
 Siddagangiah v Lakshamma, 117
 Siddaiah v Penchamma, 195, 270
 Siddaramappa v Gouravva, 535, 542
 Siddegowda v Parvathamma, 135, 572
 Sifton v Sifton, 129
 Silabai v Ramchandra, 128
 Silla Jagannadha v Lalitha Kumari, 251
 Simhachalam v Papasmma, 233, 566
 Simpson v Simpson, 101, 168, 274
 Singh v Gulab Singh, 403

Table of Cases

- Sipra Dey v Ajit Kumar Dey, 279
 Sirothia v Sirothia, 185
 Sisir Kumar v Sabita Rani, 252, 253
 Sitabai v Ramchandra, 278, 279, 551
 Sitaben v Bhanabhai, 451
 Sitalakshmi v Venkata
 Subhrahmanian, 274
 Sivaiah v Tekchand, 387
 Sivanandi v Bhagavathyamma, 61, 67
 SK Das v Superintendent JNM
 Hospital, 538
 SK Mondal v AK Mondal, 453
 Skandia Insurance Co Ltd v
 Kokilaben Chandrandan, 18
 Slon v Slon, 127
 Slowson v Slowson, 137
 Smita Dilip Rana v Dilip Dattaram
 Rana, 95, 171, 172
 Smith v R, 276
 Smith v Smith, 232
 Smriti Banerjee v Tapan Kumar
 Banerjee, 150
 Smriti Kana v Dalip Kumar, 143, 163
 Smt Beni Bai v Raghubir Prasad, 403
 Sneh Prabha v Ravinder Kumar, 96,
 580
 Snehalata v Jagadish, 271
 Snehalata v Mahenda, 486
 Snehalata v Mahendra Narain, 266, 488
 Snigdha Devi v Akhil, 159
 Snook v Watts, 142
 Sobha Badigar v Srinivas Badigar, ,
 112
 Sobha Dai v Bhimi, 486
 Sobha Devi v Bhima, 574
 Sobhana Sen v Amar Kanta Sen,
 239, 271
 Sohan Lal v Kamlesh, 235
 Solomon v Jaini Bai, 570, 579
 Som Dutt v Raj Kumari, 86
 Somaiah v Padma, 229
 Somanath v Savitri, 566
 Someshwar v Swami Nath, 403
 Somiah v Rattamma, 392
 Sonam Jopayyal v Gompu, 548
 Sonekali v Bahuria Akashi Devi, 389
 Sonia Bhalia v State of Uttar
 Pradesh, 18, 22
 Sooraj v SDO Rehli, 303
 Soumyanarayanan v Jaylakshmi, 249
 Soundrammal v Sundra Mahalinga
 Nadar, 152, 153
 SP Gupta v Union of India, 20
 Spencer v Metropolitan Board of
 Works, 20
 Squire v Squire, 112
 Sri Krishna Dass v Phool Kumari, 396
 Sri Narayan Bal v Sridhar Sutar, 505
 Sri Ram v Hukmi, 403
 Srikant v Anuradha, 116, 229
 Srikant v Saroj, 153
 Srikantaradhya v Kamalamma, 86
 Sripathinath Neogi v Ira Ranisur, 454
 Srijit Kumar v Raj Kumari, 86
 SS Bindra v Travinder Kaur, 239
 Stanwich v Stanwich, 117
 State of Bombay v Pandurang, 315,
 550, 559
 State of Haryana v Jiwan Singh, 19
 State of Haryana v Santra, 578
 State of Maharashtra v Narayana
 Rao, 313, 317
 State of Punjab v Balwant Singh, 461
 State of Punjab v Gurdev Singh, 506
 State of Travancore-Cochin v
 Shanmugha Vilas Cashew Nut
 Factory, 315
 State of Uttar Pradesh v Nand
 Kishore, 402
 State of West Bengal v
 Sudhirschandra, 18
 Statham v Statham, 117, 156
 Ste Croix v Ste Croix, 216, 217, 222
 Stibbe v Stibbe, 257, 259
 Stick v Stick, 120
 Stroud v Stroud, 166
 Stuart v Stuart, 193
 Studdy v Studdy, 189
 Subash Chandra v Maluvi, 566
 Subba Naidu v Rajammal, 402
 Subba Rao v Anasuyamma, 235
 Subbalakshmi v Ramalakshmi, 388
 Subbaraayudu v Venkatiah, 180
 Subbarama v Saraswathi, 98
 Subbarreddi v Cenchalamma, 398
 Subbayyajoga v Narayani, 344

Table of Cases

- Subha Singh v Pritam Singh, 493
 Subhan Rao v Parvathy Bai, 403
 Subhas Misir v Thagi Misir, 551
 Subhaschandra v Narbadabai, 529
 Subhashlata v N Khanna, 267
 Subhasini v BR Umakanth, 241
 Subhasini v Umakanth, 242
 Subhegowda v Hownamma, 574
 Subra Bagchi v PK Bagchi, 271
 Subramaniam v Krishnaswami, 493
 Subramanyam v Saraswathi, 260
 Subrata Kumar v Dipti Banerjee, 205
 Sudarshan Kaur v Manmohan Singh, 277
 Sudarshan Kumar v Deepak, 235, 241
 Sudeep Chaudhary v Radha Chaudhary, 234
 Sudhir Singhal v Neeta Singhal, 95, 144
 Suhagwanti v Sodhan, 403
 Suhas Pande v Manohar Pande, 270
 Sukh Ram v Gauri Shankar, 389
 Sukhdev v Santosh, 251
 Sukhma Devi v Niranjan Singh, 131
 Sukhram v Gauri Shankar, 389
 Sukram v Mishri Bai, 62
 Sukumar Mukherjee v Tripti, 108
 Sukumar v Tripti, 125
 Sulabha v Abhimanyu, 405
 Sulochana Dei v Khali Dei, 396
 Suman v Surendra Kumar, 161
 Sumanbai v Anandrao, 65
 Sumanmani Devi v Babaji Das, 493
 Sumer Chand v Ramakrishnan, 390, 392
 Sumer Chand v State of Rajasthan, 330
 Sumita Singh v Raj Bahadur Singh, 102
 Sumitra Manna v Gobinda Chandra Manna, 211
 Sunanda v Gundopant, 190
 Sunanda v Subba Rao, 270
 Sunanda v Venkata Subba Rao, 158, 190
 Sundanda v v Subba Rao, 270
 Sundara v Girija, 329
 Sundari v Laxmi, 300, 328, 469
 Sunder Singh v Manna Sunder Singh, 271
 Sunderdevi v Manakchand, 395
 Sunderlal Chourasiya v Tejila, 351
 Sundrara v Girija, 469
 Suneer Sharma v Madhurlata, 119
 Sunil Gupta v Payal, 269, 271
 Sunil Kumar v Kunti, 133
 Sunil Kumar v Satirani, 488, 509
 Sunil Mirchandani v Reena, 82
 Sunita Bali v Ashok Bali, 197
 Sunita Nikalje v Rajendra, 211
 Sunita Sallvi v Shankar Salvi, 267
 Sunita v Shyam Kali, 509
 Supruja v Vasudev, 185
 Surajmal v Rukminibai, 229, 244
 Surajmani Stella Kujur (Dr) v Durga Charan Hanshdah, 26, 27, 181
 Surbhi Agarwal v Sanjay Agarwal, 119
 Surendra Kumar Bhansali v Judge, 253
 Surendra Kumar v Kamlesh, 232, 236
 Surendrabal v Suppiah, 591
 Suresh Babu v Madhu, 487
 Suresh Prasad v Monarama, 271
 Sureshta Devi v Om Prakash, 161, 162, 164
 Surinder Kaur v Gurdeep Singh, 62
 Surinder Kaur v Harbax Singh, 486, 489
 Surinder Kaur v Madan Gopal Singh, 267
 Surinder v Harbax Singh, 509
 Surjit Kaur v Garja Singh, 54
 Surjit Kaur v Ghujhar Singh, 46
 Surjit Kaur v Tarsem Singh, 274
 Surjit Kaur v Tirash Singh, 135
 Surjit Kaur v Tirath Singh, 233, 238
 Surjit Kaur v Ujjal Singh, 48
 Surjit Singh v Kanvaljit Kaur, 78
 Surjya Kamal v Maya Dutta, 451, 454
 Surti v Narain Das, 84
 Suseelamma v Raghunath Reddy, 240
 Susha Pande v Manohar Pande, 190
 Sushama v Satish Chander, 252
 Susheela v Jagannadhan, 252
 Sushil Chandra v Bhoop Kunwar, 562
 Sushil Kumari v Prem Kumar, 138
 Sushila Bai v Prem Narain, 63
 Sushila Devi v Dhani Ram, 236
 Sushila v Vijay Kumar, 79
 Sushilabai v Narayanrao, 316

Table of Cases

Sushiladevi v Dahani Ram, 271
 Sushma Dewan v AK Dewan, 185
 Sushma Kumari v Om Prakash, 227
 Sushma Sharam v State of Rajasthan, 21
 Sushma v Suresh, 259
 Susmita Acharya v Robindra Kumar Mishra, 96
 Suvarna v GM Achary, 78
 Suvarnabahen v Rashmikant, 80
 SV Suhasini Devi v Padmanabhan Madhavan, 274
 Swaminathan v Angayarkanni Ammal, 484
 Swan v Swan, 121
 Swapankumar v Smritikans, 95
 Swapna Chakrawarti v Viplay Chakrawarti, 211
 Swaraj Garg v KM Garg, 63
 Swarajya Lakshmi v Padma Rao, 145
 Swati Solunke v Ravindra Solunke, 120
 Swayamprabha v Chandrasekhar, 206
 Sydenham v Sydenham, 254
 Szechter v Szechter, 85

T

T Hari Kumar Naidu v Pameela, 144
 T Ramadevi v TV Subramanyan, 197
 T Reddy v M Rao, 190
 T Srinivasamurthy v P Leelavathy, 448
 T Srinivasan v T Varalakshmi, 211
 Talari Erappa v Muthyalappa, 497, 505
 Tamijannessa v Purna Chandra, 21
 Tanima v Pradeep, 49
 Tara Chand v Ram Autar, 531
 Tara Mani v Narinder Kumar, 404
 Tara Singh v Shankuntala, 270
 Tarabai v Badgandi, 336
 Tarachand v Ram Autar, 557
 Tarak Das v Sunil Kumar, 448
 Taranjit v Gurbaksh Singh, 271
 Tarini v Gouri Gupta, 566
 Tarlochan Singh v Jit Kaur, 48
 Tarlochan Singh v Mohinder Kaur, 191, 271
 Taro v Darshan Singh, 301, 393
 Tate of Tamil Nadu v Kodial Canal

Motor Union, 19
 Tayawwa v Chinnappa, 187
 Taylor v Bleach, 256
 Teale v Burt, 223
 Teja Singh v Jagat Singh, 386
 Teja Singh v Sarjit Kaur, 66, 226
 Tejinderkumar v Gunmeet Singh, 173
 Tekait Mon Mohini v Basanta Kumar, 59, 66
 Thakur Ram Janki v Jago Singh, 387
 Than Singh v Barelal, 494, 496
 Thanikodi v Ramirthayee, 227
 Thankam v Rajan, 343
 Thanthoni Naicker v Kuppammal, 364
 Thayammal v Salammal, 402
 Thenkuy Veeriah v Tamisetti Nagiah, 67, 155
 Thimmaiah v Ningamma, 317
 Thimmappa v Thimmavva, 225
 Thimmaraju v Puttachenjamma, 454
 Thirumal v Rajamma, 67
 Thomas v Thomas, 149
 Thompson v Thompason, 220
 Thrimalaisevami Gounder v Parvathammal, 443
 Thulasi Ammal v Gouri Ammal, 176
 Thulasi Kumar v Raghavan, 486, 579
 Tickler v Tickler, 129
 Timmnis v Timmnis, 133
 Tirath Kaur v Kirpal Singh, 62
 Tirath v Manmohan Singh, 402
 Tirukappa v Kamalamma, 190
 TM Channabasamma v TM Rudhiah, 301
 Topha v Samman, 301
 TPKN Chettiar v Achiyayee Ammal, 574
 Trilok Singh v Savitri Devi, 228
 Trilokchand v Om Prakash, 181
 Tukaram Jadhav v Laxman Jadhav, 302
 Tukino v Aotea District Municipal Board, 19
 Tulasamma v Shesha Reddi, 397, 402, 404, 405
 Tulsa v Pannalal, 65
 Tulsi Ahir v Sonia, 392
 Tulson Devi v Krishni Devi, 76
 Turner v Turner, 170
 Turquand v Board of Trade, 20

U

Udai Narain v Kusum, 271, 272
 Udainath v Chhaya, 68
 Ude Chand v Rajo, 401
 Udhav Shankar v Tarabai, 388, 401
 Ugure Gowda v Nagegowda, 537, 558
 Ujagar Singh v Jeo, 301
 Uma Charan v Kajal, 172
 Uma Shankar v Dy Director of Consolidation, 303
 Uma Wanti v Arjan Dev, 115
 Umashankar v Radha Devi, 181
 Umashankar v Radha, 183
 Umashanker Joshi v Rajeswari, 95
 Umdesh Chand v Rameshwari Devi, 261
 Umed v Raj Singh, 18
 UmIyabehen v Ambalal, 272
 UmIyaben v Ambalal, 264
 Umri Bai v Chittar, 108, 118
 Union of India v Harbhajan Singh, 22
 Unnikrishna v Kojhikkott, 327
 Upendra Nath v Chintamani Devi, 450
 Urmila Devi v Hemant, 548
 Usha v Smriti, 453
 Usha v Sudhir Kumar, 240, 259
 Ushman v Inderjit, 78
 Utkal Contractors v State of Orissa, 20

V

V Bhagat v D Bhagat, 96, 119
 V Mallikarjunaiah v HC Gowramma, 49
 V Santhanam v S Sathya, 566
 V Sreedevi v V Varadarajan, 150, 154
 V Usha Rani v KLN Rao, 237
 Vacuum Oil Co v Secretary of State, 20
 Vadalasetti Samrajyamma v Nagamma, 158
 Vaddeboyina Tulasamma v Seshi Reddi, 379
 Vahilal v Minaben, 568
 Vajia v Thakorbhahi, 402
 Valliammal v Priaswamy, 272
 Valsamma Paul v Cochin University, 51
 Vanitaben v Divabben, 453, 454

Varadarajulu v Baby Ammal, 98
 Vasant v Dattu, 555
 Vasantha v Chandran, 568
 Vasappan v Sarada, 41, 277
 Vathsala v Manoharan, 172
 Ved Parkash v Seema, 197
 Vedavalli v Ramaswamy, 98
 Vedavyas Rao v Narayan Rao, 460
 Veena Agraval v Prahlad Das, 509
 Veena Kalia v Jatinder Nath Kalia, 157
 Veena Lodha v NM Lodha, 187
 Veena Rani v Romesh Kumar, 173
 Veena v Avinash, 260
 Veeranna v Seethamma, 592
 Veerappa Gowda v Sulochanamma, 240
 Veeraraghavamma v G Subbarao, 426
 Veeraraghavan v Parvathy, 204
 Veerasekhara v Amirthavalliamma, 323
 Veeriah v Nagiah, 62
 Veeru Gowda v Susheelamma, 236
 Velamuri Venkata Shivaprasad v Kothuri Vankateswarlu, 390, 396
 Vellinayagi v Subramaniam, 89
 Venkamma v Venkatarreddi, 406
 Venkata Subbaiah v Kamalamma, 265
 Venkatachalapathy v Saroja, 80
 Venkatakrishnaiah v Sathiyakumar, 486, 488, 509
 Venkatamma v Venkataswamy Reddy, 62
 Venkatanarayanan v K Laxmidevi, 80
 Venkataraman v S Rajalakshami, 397
 Venkateswara v Luis, 316, 322
 Venkateswararao v Nagamani, 78
 Venkateswarlu v Venkatanarayana, 100
 Venkayamma v Veerayya, 385, 391
 Venugopala Pillai v T Ammal, 400
 Venugopala Ravi Varma Raja v Union of India, 327
 Vibha Srivastava v Dinesh, 119
 Vidya Devi v Nand Kumar, 562
 Vidya v Nand Ram, 379
 Vidya v Nand supra, 379
 Vidyaben v Jagdishchandra, 316, 470
 Vidyaben v JN Bhatt, 453
 Vidyadhara v Divadevamma, 588
 Vihalal v Minaben, 565
 Vijay Kumar v Neelam Ram, 67, 163

Table of Cases

Vijay Pal Singh v Dy Director of Consolidation, 303
 Vijayalakshamma v B T Shankar, 534
 Vijayalakshmi v Inspector, Karur Police Station, 490
 Vijayalakshmi v Ramachandra, 196, 197
 Vijaykumar Bhate v Neela Bhate, 113, 119
 Vija v Thakorbhai, 402
 Vijiya v Thakorbhai, 379
 Vilayat Raj v. Sunila, 25
 Vimlesh v Prakash Chand Sharma, 114, 116, 171, 172, 227
 Vinay Kumar v Purnima, 234
 Viney v Viney, 218
 Vinod Chandra v Aruna, 226
 Vinod Dularai Mehta v Kanak Vinod Mehta, 236
 Vinod Kumar Kejriwal v Usha Kejriwal, 567
 Vinod Kumar v State of Punjab, 267, 382
 Vinod v Usha, 233, 235, 239
 Vinodchandra v Anupama, 240
 Vinodchandra v Rajesh, 250
 Vira Reddi v Kesamma, 88
 Vira Reddi v Kistamma, 97, 99, 104, 204, 208, 272
 Virappa Chettiar v Perikaruppan, 274
 Virendra Singh v Kashiram, 544
 Virupaxi v Sarojini, 138, 216, 225
 Visalakshmi v Vijayalakshmi, 457
 Vishnu Prakash v Sheela Devi, 54
 Vishwambar v Laxminarayana, 495
 Vishwanath v Prem Nath, 580
 Vishwapathi v Venkata Krishna, 390
 VV Narasaiah v CP Raju, 488
 VV Pushpakaran v PK Sarojini, 16

W

W v Official Solicitor, 100
 W v W, 79, 128
 W Y v A, 81
 Wachtel v Wachtel, 231
 Wadia v Wadia, 185
 Wali Ram v Mukhtiar Kaur, 581
 Waller v Waller, 236, 239

Walsh v Walsh, 186, 208
 Walsham v Walsham, 116
 Walter v Walter, 66
 Waman Govind v Gopal Baburao, 440
 Wandsworth Board of Works v United Telephone Co, 20
 Warter v Warter, 170
 Weatherley v Weatherley, 116, 127
 Webb v Webb, 266
 Weinberg v Weinberg, 101
 Wells v Wells, 218
 Welton v Welton, 239
 White v White and Jerome, 101
 White v White, 121, 211, 274
 Whitney v Whitney, 136
 Whysall v Whysall, 142
 William Hudson v Webster, 47
 William v William, 114, 204
 Williams v Williams, 121, 124
 Wright v Wright, 262

X

X v Hospital Z, 145, 579

Y

Y Narasinha Rao v Y Venkatalakshmi, 157
 Y Nayudamma v Govt of Andhra Pradesh, 553
 Yadala Venkata Subbamma v Yadalla Chinna Subbaiah, 403
 Yagnapurushdasji v Muldas, 26
 Yallawwa v Shantawwa, 158
 Yamnaji Jadhav v Nirmala, 96, 277
 Yamunabai v Anantrao, 47, 247
 Yamunabai v Harihar Pandit, 301
 Yamunbai v Ram Maharaj, 396
 Yankappa v Shavakka, 68
 Yankappa v Shavappa, 67
 Yashoda v Krishnamoorthy, 116
 Yellawa Gounder v Lakshmi, 440
 Yemanappa v Yellubai, 403
 Yogeshwar Prasad v Jyoti Rani, 236, 250, 252
 Yudhishter v Ashok Kumar, 300, 341

THE HINDU MARRIAGE ACT 1955

PRELIMINARY

1. Short title and extent	22
2. Application of Act	24
3. Definitions	28
4. Overriding effect of the Act	39

HINDU MARRIAGES

5. Conditions for a Hindu marriage	42
6. Guardianship in marriage	51
7. Ceremonies for a Hindu marriage	53
8. Registration of Hindu marriages.	57

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION

9. Restitution of conjugal rights	59
10. Judicial Separation	68

NULLITY OF MARRIAGE AND DIVORCE

11. Void Marriages	72
12. Voidable Marriages	76
13. Divorce	90
13A. Alternate relief in divorce proceedings	159
13B. Divorce by mutual consent	160
14. No petition for divorce to be presented within one year of marriage	164
15. Divorced persons when may marry again	169
16. Legitimacy of children of void and voidable marriages	173
17. Punishment of bigamy	179
18. Punishment for contravention of certain other conditions for a Hindu marriage	181

JURISDICTION AND PROCEDURE

19. Court to which petition shall be presented	182
20. Contents and verification of petitions	188
21. Application of Act 5 of 1908	189

21A.	Power to transfer petitions in certain cases	197
21B.	Special provision relating to trial and disposal of petitions under the Act	198
21C.	Documentary evidence	198
22.	Proceedings to be in camera and may not be printed or published	198
23.	Decree in Proceedings	200
23A.	Relief for respondent in divorce and other proceedings	229
24.	Maintenance pendente lite and expenses of proceedings	230
25.	Permanent alimony and maintenance	242
26.	Custody of children	264
27.	Disposal of property	266
28.	Appeals from decrees and orders	269
28A.	Enforcement of decrees and orders	275

SAVINGS AND REPEALS

29.	Savings	275
30.	Repeals	279

INTRODUCTORY NOTE



Marriage and sonship constitute some of the unique chapters in the *litera legis* of ancient Hindu law. As early as the time of *Rig Veda*, marriage had assumed the sacred character of a sacrament and sanction of religion had heightened the character and importance of the institution of marriage.¹ The basal thought was that marriage was a prime necessity, for that alone could enable a person to discharge properly his religious and secular obligations. The earliest records show that the rules of inheritance depended on the rules of marriage and it was obligatory on the father to give the daughter in marriage as a gift. The *smritis* deal with the subject of marriage with meticulous care and make fascinating study. *Apastamba* treated certain aspects of the law of marriage.² *Manu* expounded the subject, so also did many other *smritikars* and commentators. Medhatithi wrote: 'A girl should be married after giving her raiments and ornaments and she should also be given a portion (*Saudayika*)'.

MARRIAGE, A SACRAMENT

Marriage is necessarily the basis of social organisation and the foundation of important legal rights and obligations. The importance and imperative character of the institution of marriage needs no comment. In Hindu law, marriage is treated as a *samskara* or a sacrament. It is the last of the 10 sacraments, enjoined by the Hindu religion for regeneration of men and obligatory in case of every Hindu who does not desire to adopt the life of a *sanyasi*. In Hindu law, there were no less than eight different forms of marriage, and each being different from the other and at the same time, each form of

1 The *Rig Veda* pronounces some impressive texts: After completing the seventh step (*saptapadi*) the bridegroom said: 'With seven steps we have become friends (*sakha*). May I attain to friendship with thee; may I not be separated from thy friendship' *Shatapatha Brahmana* speaks of the wife as the half of one's self—*Ardho ha va esha atmano*.

2 *Apastamba* has stated that from time of marriage the husband and wife were united in religious ceremonies and likewise in rewards for acts of spiritual merit—*Panigrahanaddhi sabatvan karmasu, tatha punyafaleshucha*.

marriage depicts a different stage of social progress. In consequence of the varying rates at which society had advanced in different parts of India, the forms of marriage prevailing among the Hindus and the mixed Hindu races, mostly of non-Aryan origin, were of the most varied description. The Indian life presented almost every possible form of conjugal relation, from the grossest polyandry to the purest and the most rational form of monogamy.³ Of the eight forms of marriage, recognised by the ancient Hindu law, four were approved forms and four unapproved. The only forms recognised under the law in force before the commencement of this Act were the *Brahma*, which was one of the approved forms, and the *Asura* which was one of the unapproved forms. What distinguished the one from the other was that in the *Brahma* form it was a gift of the girl pure and simple, whereas in the other, consideration was received by the father or by other guardian for giving the girl in marriage. The essential ceremonies for both these forms of marriage were the same. The important distinction is that, when a woman died without leaving an issue, if her marriage was in *Brahma* form her *stridhan* devolved in one way, and if in *Asura* form, it devolved in another way. It was desirable that there should be only one form of ceremonial marriage and that the rule of succession should be uniform. A great drawback of the existing law was that a Hindu could take another wife although he had a wife living. This and some other rules relating to the conditions of a valid marriage called for substantial changes in the law of marriage.

NEED FOR CODIFICATION

A stage had been reached when codification, at least of the law of marriage and succession, had become virtually indispensable. Far-reaching and fundamental changes had become inevitable, for they alone could furnish fair and equitable solutions to some of the most controversial questions relating to the law of marriage and succession. It had been generally recognised for a long time that the rules of marriage should be materially altered and turned into a body of law, compact in form and easily accessible. A uniform and comprehensive system governing all Hindus and containing a series of coherent propositions, carefully considered and stated by the authority of the supreme legislature, was a long-felt desideratum.

The protagonists of the Hindu law reform, in matters of marriage, were on strong ground when they assailed the law as it stood. Alternative conditions had arisen in matters—social, economic and political. There was no justification for permitting plurality of wives and the time had certainly come for enforcing monogamy by law. According to the early Hindu society, monogamy was the approved rule. Polygamy was an exceptional provision and taking of

³ Banerjee, *Law of Marriage and Stridhan*, fifth edn, 1923, p 32.

more than one wife required legal justification. The weight of evidence, adduced before the Hindu Law Committee, was preponderantly in favour of monogamy as a rule of law.

DIVORCE, A THORNY QUESTION

Divorce, however, is a thorny question. Hindu law, strictly so called, did not allow divorce except in certain communities, in the lower social strata, where it was permitted by custom; and there was deep-rooted sentiment against any provision for divorce in the new legislation which was being forged. It may be of some interest to note that some of the *smritikars*, although they did not deal with divorce in the sense it is now understood, did declare that a woman could take a second husband in certain events. The celebrated test of *Narada* is 'if the husband be missing, or dead, or retired from the world, or impotent, or degraded, in these five calamities a woman may take another husband'.⁴ Statements to the same effect are made by *Devala* and are ascribed to *Katyayana*.⁵ However, the practice of remarriage appears to have fallen in disuse in the case of the three twice born castes during the *smṛiti* period itself. However, different conditions had arisen and fair and equitable solutions had to be found in case of matters affecting formation as well as dissolution of marriage. While marriage for life is the most natural form of marriage and best adapted to a civilised society, there can be little justification for legally insisting upon the union as indissoluble, even under circumstances of exceptional hardship or cases of exceptional depravity on the part of one of the spouses. Considerable evidence was adduced before the Hindu Law Committee that there were thousands of cases of desertion of women by their husbands and many cases were brought to its notice in which remarriage had been desired and was possible but could not be effected by reason of the existing law against divorce. Grounds other than desertion also required serious consideration and the committee made a strong report in favour of the proposed legislation providing for relief by way of divorce in appropriate cases. The recommendations in the report of the Rau Committee on the questions of marriage and divorce were substantially accepted by the Parliament. One additional factor in favour of providing uniform rules for divorce by Central Legislation was that in some of the states, divorce had already been allowed on certain grounds as the result of legislation.

⁴ *Nashte mrite pravrajite kleebe cha patite pateu; panchatsvapatsu nareenam patiranyo vidheevote*—XII, 37. Vaishṭha laid down that a damsel at the death of her husband may marry again if the marriage had not been consummated—XVII, 74.

⁵ The texts of *Devala* and *Katyayana* are cited in *Ratnakara* and *Parashara Madhveeya*.

WIDE AND EXTENSIVE APPLICATION OF THE ACT

Overriding Effect of the Act

The Hindu Marriage Act came into force on 18 May 1955. It amends and codifies the law relating to marriage among Hindus. Section 2 rules that the Act applies to any person who is a Hindu by religion in any of its forms and developments. Thus, for instance, *Lingayats*, *Brahmos*, *Aryasamajists*, and others who have deviated from orthodox standards of Hinduism in matters of ceremonial observances are Hindus within the ambit of the Act. So are Buddhists, Jains and Sikhs and also persons who are converts or re-converts to any of these four religions. A person, therefore, though not strictly a Hindu by religion, is included in the class of persons governed by the Act by virtue of this rule, which gives a wide application to the provisions of the Act. One effect of this is that every person who comes within the broad connotation of the term 'Hindu' can now enter into a valid 'Hindu marriage' with any other person who is also within that expansive category. It is not a mere laconism to observe that it is easier to say who are not Hindus or that the practical separation of Hindus from non-Hindus is not a matter of much difficulty. Clause (c) of sub-s (1) of s 2 adopts the negative form and in effect, lays down that it is to be presumed, until the contrary is proved, that any person who is not a Muslim, Christian, Parsi or Jew by religion is governed by this Act. The purpose obviously, is to avoid as far as possible detailed and at times complex inquiries into the matter. Section 4 is of vital importance and gives an overriding effect to the provisions of the Act. It abrogates all the rules of the law of marriage hitherto applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt within the Act. The Act also supersedes any other law contained in any central or state legislation in force immediately before it came into operation insofar as such legislation is inconsistent with the provisions contained in the Act. Rules relating to matters for which no provision is made are not, however, overridden by the Act. So also, matters affecting marriage and divorce expressly saved from the operation of the Act continue to be governed by the previous law. Thus, for instance s 29(4) lays down in terms that:

Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act 1954 (43 of 1954), with respect to marriages between Hindus solemnised under that Act, whether before or after the commencement of this Act.

Another instance is furnished by the rule laid down in sub-s (2) of the same section which enacts that nothing contained in the Act is to be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act.

SPECIAL MARRIAGE ACT 1954

The Special Marriage Act of 1954, was enacted by the Parliament to provide a special form of marriage in certain cases, for the registration of marriage and for divorce, and was made applicable to all citizens of India domiciled in the country. It is, therefore, permissible to a Hindu, by virtue of that Act, to have his marriage with another Hindu or a person belonging to any other community, solemnised in accordance with the requirements of that Act and the rights, obligations and status of the parties to such civil marriage in matters relating to restitution of conjugal rights, judicial separation, nullity of marriage and divorce are regulated by the provisions contained in that enactment.

CEREMONIAL MARRIAGE: 'HINDU MARRIAGE'

Under the Indian law, therefore, it is now open to two Hindus if they desire to contract civil marriage to have it solemnised under the Special Marriage Act of 1954. However, if they prefer marriage in a sacramental form or to state it more precisely, prefer a ceremonial marriage, then it must be solemnised in accordance with the requirements of the present Act. It seems convenient to refer to the former as a special or a civil marriage and to the ceremonial marriage regulated by the present enactment as a Hindu marriage. The legislature uses the expression 'Hindu marriage' in this Act in the context of such a ceremonial marriage for example, when it lays down the conditions for a Hindu marriage in s 5 and speaks of ceremonies for a Hindu marriage in s 7 and registration of Hindu marriages in s 8.

MARRIAGE LAWS (AMENDMENT) ACT 68 OF 1976

The present Act was amended in 1976 by the Marriage Laws (Amendment) Act of 1976, and a number of sections were altered and certain amendments of very vital nature were made in the Act as it originally stood. There have also been other amendments in the Act.

CONDITIONS FOR A VALID MARRIAGE

Sections 5 and 7 of the Act lay down the conditions and ceremonial requirements of a Hindu marriage. They are:

- (i) The marriage must be solemnised in accordance with the customary rites and ceremonies of either party and where such rites and ceremonies include *saptapadi* (taking of seven steps by the parties before the sacred fire), that requirement must be observed (s 7).
- (ii) There should not be a subsisting valid marriage of either of the parties with any other person [s 5(i)].

- (iii) The parties should as regards age and mental capacity be competent to have a marriage solemnised between them [ss 5(ii) and (iii)].
- (iv) The parties should not by reason of degrees of prohibited relationship or *sapinda* relationship be debarred from marrying one another [ss 5(iv) and (v)].

CEREMONIAL REQUIREMENTS

Incapacity Affecting Validity of Marriage

The Hindu marriage contemplated by the Act is a ceremonial marriage and it must be solemnised in accordance with the customary rites and ceremonies of one of the two parties. Non-observance of the essential customary rites and ceremonies of at least one of the parties would amount to failure to solemnise the marriage. A marriage, not duly solemnised by performance of the essential ceremonies is, under the Act, no marriage at all. The condition that neither party must have a spouse living at the time of marriage is absolute with the result that monogamy is now the rule. The condition about prohibited degrees of relationship and the bar arising from *sapindaship* are also basic and cannot be ignored, except that where there is a custom or usage governing both the parties which dispenses with the bar arising from prohibited degrees of relationship and *sapindaship*, such custom or usage will prevail. As to mental capacity, the marriage is voidable if at the time of the marriage either party was incapable of giving a valid consent to it in consequence of unsoundness of mind; or suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of children; or had been subject to recurrent attacks of insanity or epilepsy. The age has been now prescribed for the bridegroom and the bride, as 21 and 18 years respectively.⁶ Child marriages are discouraged now, both by law and society, but the evil had been there for a long time and the legislature has stopped short of declaring them as null and void or even voidable. The legal deterrent, however, is that a breach of the conditions relating to age is punishable as an offence [s 18]. It will be seen that non-fulfillment of every one of the conditions and requirements enacted in s 5 does not ipso facto render the marriage null and void or even voidable.

CONCEPTION OF HINDU MARRIAGE UNDER THE ACT

Marriage under the Act, therefore, is the union of one man with one woman to the exclusion of all others, satisfied by the solemnisation of the marriage

⁶ Hindu Marriage Act 1955, s 5(iii).

in accordance with requisite ceremonies and, it directly creates a relation between the parties and that is called the status of each.⁷ The status of an individual, used as a legal term, means the legal position of the individual, in or with regard to the community; the relation between the parties, and that status of each of them with regard to the community, which are constituted upon marriage, are not imposed or defined by contract or agreement but by law. Hindu marriage, under the Act, is a monogamous marriage which must be solemnised by performance of the essential rites and ceremonies and there must be no incapacity in the parties to marry one another arising from prohibited degrees of relationship or *sapinda* relationship.

After laying down the requirements relating to solemnisation of a Hindu marriage and stating the conditions appurtenant to the same and stressing that only a monogamous marriage is now permissible in case of Hindus, the Act proceeds to make provision for the relief that can be granted by the court in matrimonial causes and the grounds on which any such relief may be obtained.

Reliefs in Matrimonial Causes

The reliefs, which can be obtained under the Act are:

- (i) decree for nullity of marriage—where the marriage is void *ipso jure* (s 11);
- (ii) decree for nullity of marriage—where the marriage may be annulled by the court on grounds, which render it voidable (s 12);
- (iii) decree for divorce on grounds specified in s 13;
- (iv) judicial separation on grounds specified in s 10 read with s 13;
- (v) restitution of conjugal rights—where one of the spouses has, without reasonable excuse, withdrawn from cohabitation from the other, the aggrieved spouse can obtain from the court, a decree pronouncing restitution of conjugal rights (s 9).

MARRIAGE VOID IPSO JURE

A Hindu marriage, solemnised after the commencement of the Act, is void *ipso jure* in case of bigamy or where the parties were within the prohibited degrees of relationship or were *sapindas* of each other, unless in the case of any of the two last mentioned conditions the custom and usage governing both the parties to the marriage permits of a marriage between them. Any marriage in contravention of any of these three conditions is null and void from its inception and either party to such marriage can obtain a decree of nullity from the court against the other party (s 11). Parties to a marriage

⁷ Reference may be made to notes to s 5 under 'Conditions for a Hindu marriage under the Act'.

solemnised before this Act came into force are not, however, affected by this rule. In respect of matters dealt with by this rule, they are governed by the previous law. However, the prohibition imposed against bigamy is equally applicable to them in the sense that a Hindu husband cannot, after the Act came into force, marry another wife as long as his previous marriage is subsisting.

VOIDABLE MARRIAGE

A decree for nullity of marriage may also be obtained by a party on the grounds which render the marriage voidable at his or her instance (s 12). Briefly stated are the grounds: impotency of the respondent; mental incapacity of the respondent at the time of the marriage; that the consent of the petitioner or of the guardian in marriage of the petitioner had been obtained by force or fraud; that the respondent was at the time of the marriage pregnant by some person other than the petitioner and the petitioner was at the time of the marriage ignorant of that fact. This relief by way of annulment of a voidable marriage is obtainable by a party in case of any Hindu marriage, whether solemnised before or after the commencement of the Act.

DISTINCTION BETWEEN VOID AND VOIDABLE MARRIAGE

Distinction Between Nullity of Marriage and Divorce

The scheme of the Act, considered from the point of the validity or otherwise of a marriage, is to lay down at the outset, the conditions relating to the formation of a valid marriage and then to deal with marriages which are void and those which are not void but voidable at the instance of one of the parties to the same and the various reliefs that may be granted. A decree for nullity of marriage can be granted in case of a marriage, which is void *ab initio*, and in case of a marriage, which is voidable on grounds to which reference has already been made. A void marriage is one that will be regarded by every court, in any case in which the existence of the marriage is in issue, as never having taken place and can be treated as void by both parties to it without the necessity of any decree annulling it. Of course, it is open to a party to a void marriage to have recourse to the court for a declaration that it is null and void, but that would be for the purpose of precaution or record. A voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction. The expression 'divorce' is sometimes broadly used as comprehending both, decree for nullity of marriage and dissolution of marriage in the sense of its complete abrogation.

but this is not in consonance with modern legislative practice. The expression, as used in the Act has limited connotation and is predicated on an existing marriage which during its subsistence, was valid in the eye of the law and which it operates to dissolve. Decree for nullity of marriage, on the other hand, is to be granted when the marriage was void *ab initio* or when it was voidable at the instance of an injured spouse. In the case of a marriage void *ab initio*, it did not at any time have any legal existence; in the case of a marriage voidable, it was valid as long as it was not successfully impeached by the party who had in his or her power to avoid it. In the case of a marriage, which is void *ab initio*, an ostensible marriage, which was void from the inception, is stripped of its colour of legality by declaring its nullity for reasons existing at the time of the marriage. In case of divorce, the marriage having been duly solemnised and itself not being void or voidable, is dissolved by the court usually for any reason arising after the marriage.

MARRIAGE LAWS (AMENDMENT) ACT 68 OF 1976

Considerable modifications and amendments in the present Act of 1955 were brought about by the Marriage Laws (Amendment) Act 68 of 1976. Reference has been made to the same, wherever it was necessary to do so.

DIVORCE

A decree of divorce dissolving marriage, whether solemnised before or after the commencement of the Act, may be obtained by the husband or the wife on the grounds set out in s 13 of the Act. The grounds are: (i) that the other spouse has committed adultery; or (ii) treated the petitioner with cruelty; or (iii) has deserted the petitioner for a period of two years; or (iv) has ceased to be a Hindu by conversion to another religion; or (v) has been incurable of unsound mind or suffering from mental disorder as set out and explained in that section: or (vi) has been suffering from a virulent and incurable form of leprosy; or (vii) has been suffering from venereal disease of a communicable form; or (viii) has renounced the world by entering any religious order; or (ix) has not been heard of as being alive for a period of seven years or more.

The above grounds apart, either party to a marriage, whether solemnised before or after the commencement of the Act, may obtain a decree of divorce on the ground that there has been no resumption of cohabitation between them for a period of one year or upwards after the passing of a decree for judicial separation, or that there has been no restitution of conjugal rights between them for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

In addition to these grounds, a wife can seek dissolution of marriage on

the following grounds: (i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband, married before such commencement, was alive at the time of the solemnisation of the marriage of the petitioner, that in either case the other wife is alive at the time of the presentation of the petition; or (ii) that the husband has since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality; or (iii) that a decree or order of the court has been made against the husband awarding maintenance to the wife, notwithstanding that she was living apart and that since the passing of such decree or order cohabitation between the parties has not taken place for one year or upwards; also (iv) dissolution of the marriage on the ground that her marriage was solemnised before she attained the age of 15 and she repudiated the marriage before attaining the age of 18 (even if the marriage had been consummated).

DECREE FOR JUDICIAL SEPARATION INSTEAD OF DIVORCE

The court has now been vested with the power to grant only a decree for judicial separation in the case of some of the grounds mentioned above instead of a decree for divorce.

DIVORCE BY MUTUAL CONSENT

The court may have to pass a decree for divorce by mutual consent of the parties, as now enacted by the Amending Act of 1976 in s 13B of the Act. This is where the requirements of that section are satisfied and not otherwise.

JUDICIAL SEPARATION

Judicial separation can be obtained by either party to a marriage on any of the grounds mentioned in sub-s (1) of s 13 and furthermore, in case of the wife on any of the grounds mentioned in sub-s (2) of that section which relate to divorce. After the Amending Act of 1976, a party may claim only judicial separation instead of divorce, since the grounds for both are now the same.

DISTINCTION BETWEEN DIVORCE AND JUDICIAL SEPARATION

Without going into the historical and other aspects of 'divorce', which prior to the English Matrimonial Causes Act 1857, could be of two distinct types: absolute or a *vinculo matrimonii* and limited or a *mensa et thoro*; it will suffice to observe that it is the divorce a *mensa et thoro* which is historically

the background of the action for judicial separation. The distinction between a decree for divorce and one for judicial separation may be briefly stated. A decree for divorce has the effect of dissolving the marriage and puts an end to the marriage ties and the separation is absolute and final. A decree for judicial separation is one for legal separation and does not of itself result in dissolution of the marriage, though it may furnish a ground for divorce where cohabitation has not been resumed for a period of one year after the passing of the same. It is in affirmance of the marriage and has the effect of suspending as it were the matrimonial and certain mutual rights and obligations of the parties. The separation is not absolute and final and the marriage ties continue to subsist. There is always a *locus poenitentiae* and the parties may at any time resume cohabitation.

SCHEME OF THE ACT IN RESPECT OF THE ABOVE RELIEFS

The scheme of the Act, even after the recent amendments relating to the provisions for divorce and judicial separation, it must have been noticed, is not to make divorce very easy and even while giving relief somewhat liberally in cases of matrimonial offences, is to frame the law as would provide opportunities for mutual adjustment between the parties.

The grounds on which dissolution of marriage should be permissible must, to some extent vary, even in systems of law which recognise only a monogamous marriage and must remain a debatable subject. In a sense, the grounds are bound to be somewhat arbitrary. The nature of the grounds and what should be regarded as matrimonial offences or misconduct on the part of one or both the parties must inevitably raise some problems not easy of solution. The legislature has opted to follow a middle course by not adopting any of the two extreme views one of which favours an easy dissolution of the tie absolutely and at the sheer desire of the parties and the other which insists upon very stringent grounds. Divorce in case of Hindu marriage is not favoured, nor is it encouraged. It is discouraged but without enforcing conditions which may cause great hardship or drive parties to act in collusion with one another.

CHANGES IN LAW BROUGHT ABOUT BY THE ACT

The Act, it must have been noticed, brings about some fundamental and salutary changes in the law of marriage. Even if the Act seems to break violently with the past, it has to be conceded that it is characteristic of the age, which is fast changing both in social, economic and political theories. The following changes brought about by the Act in the law of marriage are particularly notable:

- (i) A Hindu marriage, by which is meant a marriage solemnised in

accordance with the requirements of the Act, can take place between any two persons who come within the broad connotation given by the Act to the expression 'Hindu' (s 2). Intercaste marriage between persons of different castes—*Brahmin*, *Kshatriya*, *Vaishya* and *Sudra*—or persons professing the Hindu, Buddhist, Jain or Sikh religion, is not prohibited. Section 29 of the Act gives retrospective effect to this rule and lays down that a ceremonial marriage solemnised before the commencement of the Act between persons who come within the broad connotation of the expression 'Hindu', if otherwise valid, shall not be deemed to be or to have been invalid by reason only of the fact that the parties belonged to these different religions or different castes. The division of Hindus formerly made by reference to their castes *Brahmin*, *Kshatriya*, *Vaishya* and *Sudra* has now no bearing on the subject of marriage.

- (ii) Monogamy, which is essentially the voluntary union for life of one man with one woman to the exclusion of all, is enforced by legislation [s 5(ii)]. Any marriage between two Hindus solemnised after the commencement of the Act is null and void, if at the date of such marriage either party had a husband or wife living (s 17).
- (iii) Bigamy is rendered punishable as an offence under the Indian Penal Code 1860 (s 17).
- (iv) The conditions and requirements of a valid Hindu marriage are considerably simplified (ss 5 and 7).
- (v) Reliefs by way of judicial separation, declaration of nullity of marriage and divorce are recognised (ss 10–13).
- (vi) Provision is made for legitimacy of children of void and voidable marriages (s 16).
- (vii) Provision is made for alimony pendente lite, permanent alimony and maintenance (ss 24 and 25).

DECISION OF COURTS IN ENGLAND

A comparison of a number of provisions, including those relating to grounds for relief in matrimonial cases in the present enactment, with analogous provisions in the status on the subject in England, will show that they are based mainly on the English Acts. The main principles are the same and likewise are some important details. The deviations in principle are not on any major points and are introduced in order to adapt the law to Indian conditions. The wording of clearly defined principles in the English Act of 1950, have been freely adopted in the present Act, though the scheme of the present Act is, in some respects, materially different. On analogous provisions unaffected by the specialities of the English Acts and on fundamental concepts and broad general principles, decisions of courts in England can be helpful if utilised with due care.

In a case under the Bombay Hindu Divorce Act,⁸ the Supreme Court of India drew largely on the English law in stating a number of broad general principles relating to desertion as a matrimonial offence. In a branch of law, rules of which are inspired by the broad general principles of the English law, decisions of courts in England, insofar as they enunciate and expound those principles, can always be of considerable guidance and assistance. Danger, however, lies in phrases used aptly enough, no doubt, in a particular context and opinions useful in their own sphere being treated as expressing doctrines of universal application or adopting those principles as riders to the actual statutory language. The rule of construction relating to provisions of enactments *in pari materia* is one of importance and of great convenience and aid from outside may legitimately be derived on any doubtful point of interpretation of any provision, but resort to it simply on the ground of similarity, must be avoided. In a field such as is covered by the present enactment, great care is required when examining the decisions of courts in England on the question of construction of any similar provisions. It will be noticed that despite the similarity there are in some cases changes in the language and the terminology employed. There are also differences in the scheme and framework of the two enactments. Even when examining the provisions which may seem to be *in pari materia*, it will be necessary to note that, having regard to the scheme of the present Act and the framework in which any particular rule under consideration is enacted, in India keeping the social and economic conditions in mind, the rule may require broader or restricted interpretation and it need not necessarily be construed precisely in the same way.

Considerable and extensive changes have been effected in England in matrimonial law after the Matrimonial Causes Act of 1950, by various statutes. The sole ground on which a petition for divorce may be filed under Matrimonial Causes Act 1973 is, in case either party to a marriage feels that the marriage has broken down irretrievably. Apart from adultery, desertion and other well-established factors, the court may find that the marriage has broken down irretrievably, where the petitioner satisfies the court that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

DUTY OF THE COURT

Before proceeding to grant any relief under this Act, it is the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. In proceedings under the Act, whether defended or not, it is also the duty of the court to

⁸ *Bipin Chander v Prabhawati* AIR 1957 SC 176.

see that the petitioner is not taking advantage of his or her own wrong and to satisfy itself that the evidence does not disclose any statutory bar or connivance, condonation, collusion, unnecessary delay in instituting proceedings or any other legal ground why relief should not be granted, even though the matrimonial offence on the part of the other spouse may have been proved (s 23). It is with zealous care that the court interferes with the obligations of the marriage vow. It must not lose sight of the fact that dissolution of marriage is a matter of grave import and the last expedient of the law. The court must not overlook that, unlike the English enactments, the Hindu Marriage Act leaves little discretion with it in the matter of granting or withholding relief. It must, therefore, refrain from analogy drawn from cases decided under other enactments, which confer unfettered discretion on the court by recognising that certain bars to relief and discretion are not absolute.⁹ At the same time, it is the duty of the court to act with sound discernment and where a ground for relief is established, it must act on it; and while applying any of the statutory bars laid down in s 23, it must not act on any preconceived classification of circumstances but on the broad principles on which those statutory bars rests and must see that it does not apply to them in a manner as would result in any unreasonable withholding of the relief which it is its duty to grant.

IRRETRIEVABLE ESTRANGEMENT

It is worth noting that since some time now, courts in India have come to accept the 'irretrievable breakdown of marriage' as a concept. The trend of various judicial decisions shows that if any of the grounds for dissolution of a marriage do exist, courts lean in favour of severance of matrimonial ties, since as has been held by decisions of the apex court that if along with the existence of grounds for disruption of marital ties in a given case, it is found that the relationship between the spouses has broken down to such an extent that it would be difficult to retrieve the situation and effect a reconciliation, the court could permit a disruption in the interest of the spouses. Courts have, however cautioned that mere 'irretrievable breakdown' of a marriage cannot lead to disruption of marital ties. This is since what has not been laid down by the legislature cannot be introduced or imputed into grounds for entitlement of divorce and each case would have to be judged by courts on its attendant factual matrix in order to arrive at a conclusion as to irretrievable breakdown. Thus, the duty of a court in such circumstances, is onerous and must be exercised with sound discernment.

⁹ Notes to s 23

THE HINDU MARRIAGE ACT 1955



25 OF 1955

[18 May 1955]

An Act to amend and codify the law relating to marriage among Hindus.

Be it enacted by Parliament in the Sixth Year of the Republic of India as follows:

PREAMBLE

A preamble to an enactment of the legislature was formerly regarded as a key to open the mind of the makers of the Act, and the mischief which they intended to redress. The practice of inserting elaborate preambles in enactments of the legislature has disappeared and it is now regarded as a well-settled law that a preamble cannot either restrict or extend the enacting part when the language and the scope of an Act are not open to doubt. It sometimes happens that a preamble is narrow but the enacting words large. The preamble to the present Act speaks only of the law relating to marriage. Under the legislative practice followed in India, it is not unusual to lay down the law relating to the formation of marriage as also its dissolution and other allied matters in the same enactment. The Act lays down rules relating to the solemnisation and requirements of a valid Hindu marriage. It also lays down rules relating to restitution of conjugal rights, judicial separation, nullity of marriage, divorce, legitimacy of children, and other allied matters.

CODIFYING ACT

It is clear from the preamble that it is intended by the Act not merely to amend but to amend and codify the law relating to marriage among Hindus. The object of codification of a particular branch of law is that, any matter specifically dealt with by it should be sought for in the codified enactment itself. Where a statute is expressly said to codify the law, the court, as a rule,

is not at liberty to go outside the law so created, simply because before the existence of that enactment, another law prevailed. The following observations of Lord Herschell in *Bank of England v Vagliano*,¹ in a passage which has now become *locus classicus*, were cited with approval by the judicial committee of the Privy Council in *Norendra Nath v Kamalbasini Dasi*:²

The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions...

A codifying statute does not, however, altogether exclude reference to earlier law on the subjects covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute, where they are open to rival constructions. In respect of matters specifically dealt with in the statute, earlier law cannot be invoked otherwise than for this limited purpose; it cannot be relied on for the purpose of adding to it something which is not there. The following general observations of the House of Lords in England in *Quebec Railway Co v Vandry*³ may be found useful:

The first step, the indispensable starting point, is to take the codifying enactment itself and to examine its words, and to ask whether their meaning is plain. Only if the enactment is not plain can light be usefully sought from exterior source. Of course it must not be forgotten what the enactment is, namely a Code of systematised principles and rules, not a body of administrative directions or an institutional exposition. Of course also the Code, or at least the cognate sections, should be read as a whole, forming a connected scheme; they are not a series of

1 [1891] AC 107.

2 23 Cal 563, 571, 572 (PC); *Robini Kumari v Narendra Singh* AIR 1972 SC 459; *VV Pushpakaran v PK Sarojini* AIR 1992 Ker 9 (disputes under this Act cannot be referred to an arbitrator and must be decided by the competent court).

3 [1920] AC 662; *Anandji Haridas and Co v Engineering Mazdoor Sangh* AIR 1975 SC 946.

detached enactments. Of course again, there is a point at which mere linguistic clearness only makes the obscurity of actual provisions or leads to such irrational or unjust results that, however clear the actual expression may be, the conclusion is still clearer that no such meaning could have been intended by the legislature.

Question may arise whether this Act is a complete Code in the sense of comprehensive legislation dealing with every phase and aspect of the law of marriage. In an Act intended to amend and codify a particular branch of law, insofar as there is express enactment, that alone must be looked at since the court is bound by it and can look to nothing else and the express enactment must govern the rights of the parties even though it has radically altered or modified the prior law. The Act both amends and codifies the law of marriage and, as has already been pointed out,⁴ has made a number of fundamental and important changes in the prior law. Reference in this connection may be made to s 4 which gives overriding effect to the provisions of the Act. It follows that with respect to matters for which provisions are made in the Act the prior law ceases to have effect to the extent laid down in that section. It also follows that in respect of matters for which no provision is made in the Act the old law must continue to remain applicable, though such matters are indeed few.

When law has been codified, it cannot be modified gradually from day to day as the changing circumstances of the community requires, by rules made to meet those imperceptibly changing conditions and any modification, however small, must be made by the parliament.

DECISIONS OF COURTS IN ENGLAND

A comparison of many provisions of this Act with analogous provisions in the English Matrimonial Causes Act 1950, will show that they were based on the English Act. Thereafter, there have been a number of statutes in England on the subject, for instance, the Matrimonial Causes Act 1973. It is submitted that decisions of courts in England on the subject freely referred to in the past continue to be of guidance in India, but in view of the more recent enactments in England, the more recent decisions of those courts should be viewed with extreme care and caution. Reference may be made to the Introductory Note to this Act. (Also, see notes under ss 10 and 13).

RULES OF INTERPRETATION OF STATUTES

The following are the principal rules relating to the interpretation of statutes.

⁴ Marriage Laws (Amendment) Act 68 of 1976.

Intention of the Legislature

The fundamental principle of interpretation of a statute is that it should be construed according to the intent of the legislature, which passed the Act. If the words of the statute are in themselves precise and unambiguous, then nothing more is necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law-giver. There is another rule, however, which must not be overlooked in this connection. It is to the effect that the court must not create or imagine an ambiguity where it really does not exist. To do so would in many cases frustrate the enactment and defeat the general intention of the legislature.⁵ Intention of the law-giver cannot be defeated by judicial construction.⁶ Liberal construction does not mean adding what is not contemplated by the legislature in enacting a particular statute.⁷

Construing the provisions of the Divorce Act in relation to this Act or the Special Marriage Act, the Andhra Pradesh High Court in a special reference held, on the basis of *Reynolds Rajamani*, that the spouse cannot seek divorce as provided under this Act or the Special Marriage Act 1954 and the analogy of these Acts cannot be made applicable to a petition under the Divorce Act. This also is a matter of construction and the intention of the legislature.⁸

As a general rule, the intention of the legislature is to be gathered from the language used and function of the court is not to say what the legislature meant but to ascertain what the legislature has said it meant. As was observed by Lord Watson in *Salomon v Salomon & Co.*⁹

Intention of the legislature is a common but very slippery phrase, which popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

5 *Powell v Kepton Park Race Course Co* [1899] AC 143, 185 per Lord Davey; *Umed v Raj Singh* [1975] 2 SCR 667; *Nepra v Sayer* (1928) 55 Cal 67, 75; *Finch v Finch* (1943) Lah 765, 776; *Skandia Insurance Co Ltd v Rokilaben Chandrandan* (1987) 2 SCC 654; *Amdal Ammal v Sadasuan Pillai* (1987) 1 SCC 183; *Satyendra Narayan Singh v State of Bihar* (1987) 3 SCC 319; *Polestar and Co v Addl Sales-tax Comm* AIR 1987 SC 897; *Sonia Bhalia v State of Uttar Pradesh* AIR 1981 SC 1274.

6 *State of West Bengal v Sudbichandra* (1976) 4 SCC 701; *Ramesh Chandra v Veena Kaushal* AIR 1978 SC 1807, 1811.

7 *Reynold Rajamani v Union of India* AIR 1982 SC 1261.

8 *Amarthala Hemalatha v Dasari Balle Rajendra Varaprasad* AIR 1990 AP 220.

9 [1897] AC 22, 38; *Re Hungerford Investment Trust Ltd* (1935) 62 Cal 133; *Bishunlal v Jagarnath* (1943) 22 Pat 148; *Osmania University Teachers Ass v State of Andhra Pradesh* (1987) 4 SCC 671.

Literal Construction

One of the most important rules of construction is the rule of literal construction, and courts are bound to construe provisions of the statute according to their plain and obvious meaning. If there is nothing to modify, nothing to alter, nothing to qualify the language, which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences.¹⁰ It has been repeatedly observed that in construing enacted words, the court is not concerned with the policy involved or with the result, injurious or otherwise, which may follow from giving effect to the language used by the legislature.¹¹ The legislative intent must be gathered from the language used without speculating about it.¹²

The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the statute, in which case, the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.¹³

When the language of a section is not only plain, but admits of one meaning, the task of interpretation can hardly be said to arise. *Absoluta sententia expositore non indiget*. Such language best declares the intention of the law-giver and is decisive of it.¹⁴ It would be contrary to all rules of construction to read words into a statute, unless it is necessary to do so.¹⁵ The court cannot appropriate to itself the duty of supplying any deficiencies in the statute. It will not add, amend, or by construction, make up such

10 *Cox v Hakes* [1890] 15 AC 506, 542; *Hiralal v State of Uttar Pradesh* AIR 1973 SC 1034; *Muhammad v Comm of Income-tax* (1931) 12 Lah 129 (FB); *Gurmukh Singh v Intazamia Committee* (1942) Lah 217 (FB); *Raghunandan Saran v Pyarelal Workshop Pvt Ltd* AIR 1986 SC 1982; *Pritipal Singh v Union of India* AIR 1982 SC 1413; *State of Tamil Nadu v Kodial Canal Motor Union Pvt Ltd* AIR 1986 SC 1973.

11 *AG of Alberta v AG of Canada* AIR 1945 PC 76; *Tukino v Aotea District Municipal Board* AIR 1941 PC 109; *State of Haryana v Jiwan Singh* (1976) 1 SCC 99, 102; *Lohia Machine v Union of India* AIR 1985 SC 421; *Geevanlal Ltd v Appellate Authority* AIR 1984 SC 1842.

12 *Polestar Electronic Pvt Ltd v CST* AIR 1978 SC 897; *Osmania University Teachers Ass v State of Andhra Pradesh* (1987) 4 SCC 671.

13 *Grey v Pearson* (1957) 6 HL Cas 61, 106; *Mahadeolal v Administrator-General* AIR 1960 SC 936, 939; *Manmohandas v Bisbun Das* AIR 1967 SC 277, 278; *PR Nayak v Union of India* AIR 1972 SC 554, *Senior Superintendent RMS v Gopinath* AIR 1972 SC 1487, *Punjab Beverages Pvt Ltd v Suresh Chand* (1978) 2 SCC 144; *Badsha Mia v Rajjab Ali* AIR 1946 Cal 348 (FB); *Shiv Charan v Ram Saran* (1943) Lah 497 (FB); *LH Sugar Factories v Moti* AIR 1941 All 474 (FB); *Re Krishnamurthi Ayyar* AIR 1942 Mad 9; *Income Tax Comm v JH Gotla* AIR 1985 SC 1698; *American Home Products Corp v Mac Laboratory Pvt Ltd* AIR 1986 SC 137, 166.

14 *Maxwell on Interpretation of Statutes*, 11th edn, 1962, p 4; *Arvind Mohan v Amulya Kumar* AIR 1974 SC 1818; *Girdharilal and Sons v Bahuir Nath* AIR 1986 SC 1499, 1501; *Glaxo Laboratory India Ltd v Presiding Officer, Meerut* AIR 1986 SC 505; *Shivram v Radhabai* AIR 1984 SC 786.

deficiencies. Whether the omission appears to have flowed from forgetfulness of the draftsman or is intentional, is no concern of the court and it is well-settled that a *casus omissus* cannot be supplied by a court of law, for that would be to make laws.¹⁶ If however, the words of a provision are sufficiently flexible, it can be construed in the sense which if less correct grammatically, is more in harmony with the intention of the legislature; and to arrive at the real meaning, it may be necessary to get an exact conception of the aim, scope and object of the whole Act.¹⁷ The true meaning of any passage of the statute is that which best harmonises with the object and with every other passage of the statute, and it is a well-settled rule that the same words are to be *prima facie* construed in the same sense in the different parts of the same statute.¹⁸ A court should not deal separately with the terms of an enactment, which is in its nature composite. It should avail itself, as an aid to construction, of the light thrown upon each of its expressions by the presence within it of the others. Further, in its construction of words, it should pay sufficient regard to the setting, in which they are found.¹⁹ A well-established rule applicable to all statutes is the rule of construction *ex visceribus actus*. The court is bound to see that the interpretation it puts on a particular provision is a consistent with the whole statute.

In general, it is true that in dealing with matters relating to the general public, a statute is presumed to use words in their popular sense *uti loquitur vulgus*. However, it has to be remembered that the meaning of words is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular sense, as in the subject or in the occasion on which they are used, and the object to be attained. General words, however wide in the abstract, are more or less elastic, and admit of restriction or expansion to suit the subject matter.²⁰ It is sometimes said that words in a statute are to be understood in a legal sense. That principle is of cogency when the words in question represent only legal conceptions.

15 *Renulu Bose v Manmatha Nath* (1945) 49 CWN 491(PC); *LIC India v Escort Ltd* AIR 1986 SC 1370; *Polestar and Co v Addl Sales-tax Comm* AIR 1978 SC 897.

16 *Kamalaranjan Roy v Secretary of State* AIR 1938 PC 281; *Comm of Sales-tax v Parson Tools and Plants* AIR 1975 SC 1039; *Gurdial Singh v Central Board, Local Committee, Amritsar* (1928) 9 Lah 689, 698-99; *SP Gupta v Union of India* AIR 1982 SC 149, 176.

17 *Re Mayfair Property Co* [1898] 2 Ch 28, 35.

18 *Ganpat Vithal* (1941) 13 Bom LR 976; *Spencer v Metropolitan Board of Works* (1883) 22 ChD 142; *Khan Gul v Lakha Singh* AIR 1928 Lah 609 (FB); *Turquand v Board of Trade* (1886) 55 LJQB 417.

19 *Vacuum Oil Co v Secretary of State* (1932) 56 Bom 313 (PC); *Phillips India Ltd v Labour Court* AIR 1985 SC 1034; *LIC of India v Escorts Ltd* AIR 1986 SC 1370.

20 *Kamarlal v Amar Nath* [1975] 2 SCR 239; *Wandsworth Board of Works v United Telephone Co* 13 QBD 904, 920; *Maxwell on Interpretation of Statutes*, 11th edn, 1962, p. 59; *Ukal Contractors v State of Orissa* (1987) 3 SCC 279; *Mangalore Electricity Supply Co v CIT* AIR 1978 SC 1272.

The popular use of such words may not represent the primary meaning of the words, but some understanding of them.²¹

The court cannot look into the proceedings of the legislature to see what took place during the passage of the Bill which became the law; it cannot seek the assistance of the debates in the legislative council, or the report of the select committee for the purpose of interpreting a statute. Nor will it, for such a purpose, refer to any statement of objects and reasons annexed to a Bill brought before the legislature.²² However, it may be looked at, for the purpose of determining the mischief the statute sought to remedy or as furnishing historical background or the conditions prevailing at the time of the enactment of the statute that is the antecedent state of affairs leading to the legislation, though it cannot be used as an aid of construction or to control its amplitude.

REFERENCE TO PREVIOUS LAW

Another rule of construction which must not be overlooked in dealing with an Act like the present one is that the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.²³

HEADINGS

The heading of a chapter can be looked at for the purpose of interpreting a section in the statute.²⁴ The recent trend of decisions is to treat them as

21 *Lord Advocate v Stewart* [1902] AC 344.

22 *Aswini Kumar v Arabinda Bose* AIR 1952 SC 369; *Mahalakshmi v Sham Rangini* (1941) 1 Cal 499; *Krishna Ayyangar v Nalla Perumal* (1920) 43 Mad 550, 565 (PC); *Raj Mal v Harnam Singh* (1928) 9 Lah 260; *Dina Nath v Sati Prosad* (1922) 27 CWN 115; *Gopal Pandey v Parsotam* (1883) 5 All 121 (FB); *Administrator-General v Premlal* (1895) 22 Cal 788 (PC); *Tamijannessa v Purna Chandra* AIR 1927 Cal 821; *Shantanand v Basudevanand* (1930) 52 All 619 (FB); *Shusma Sharma v State of Rajasthan* AIR 1985 SC 1367, 1376; *DK Trivedi and Sons v State of Gujarat* AIR 1986 SC 1323; *Narain Khanman v Parshuman Kumar* AIR 1985 SC 4; *Govind Saran Ganga Saran v CIT* AIR 1985 SC 1041.

23 *Bank of England v Vagliano* (1891) 18 Cal 107, 144, 145; *Despatie v Tremblay* [1921] 1 AC 702, 709; *Norendra Nath v Kamalabasini* (1896) 23 Cal 563 (PC); *Raghumull v Official Assignee of Calcutta* (1924) 28 CWN 34, 42-43; *A Venkateswarlu v Government of Andhra Pradesh* AIR 1978 SC 945, 948; *Sushma Sharam v State of Rajasthan* AIR 1985 SC 1367.

24 *Eastern Countries Co v Marriage* (1860) 9 HLC 32, 41; *Dwarkanath v Tafazal* (1917) 44 Cal 267.

substantive part of the statute and a better key to construction than a mere preamble.

MARGINAL NOTES

It has been observed by the judicial committee of the Privy Council, that marginal notes to the sections cannot be referred to for the purpose of construing an Act of the legislature.²⁵ There is no reason, however, why marginal notes may not be looked at in order to see the general trend of a section;²⁶ or where there is ambiguity or doubt about the true meaning of the provision.²⁷

RECENT ENACTMENTS

It is a sound principle of interpretation of statutes that whenever it is possible to do so, the court will construe provisions which appear to conflict so that they harmonise. This principle is also applicable to provisions in different statutes, which form part of a scheme of legislation as in the case of the recent four enactments.²⁸

CHAPTER I

PRELIMINARY

1. Short title and extent.—(1) This Act may be called the Hindu Marriage Act 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

COMMENCEMENT AND EXTENT

The Act received the assent of the President on 18 May 1955 and came into operation on that day.²⁹

²⁵ *Balraj v Jagatpal* (1904) 26 All 393, 406 (PC); *Ram Saran v Bhagwat Prasad* (1929) 51 All 411 (FB); *Shakuntala v Mahesh* AIR 1989 Bom 353.

²⁶ *Secretary of State v Bombay Municipality* (1935) 37 Bom LR 499, 508; *Abdul Hakim v Fazu Miya* (1935) 62 Cal 266; *Dharwar Urban Bank Ltd v Krishnarao* (1937) 39 Bom LR 203, 209–10; *Brijmohan v Tulsiram* AIR 1942 Nag 53.

²⁷ *Union of India v Harbhajan Singh* AIR 1972 SC 1061.

²⁸ *MSCO Pvt Ltd v Union of India* AIR 1985 SC 76; *Sonia Bhalia v State of Uttar Pradesh* AIR 1981 SC 1274.

²⁹ General Clauses Act 1897, s 5 (1)(b).

The Act is applied to Hindus in the whole of India except the State of Jammu and Kashmir. It has now by appropriate legislation been applied also in Jammu and Kashmir. The Act also applies to Hindus domiciled in India as well as to those who are living outside India. The general principle of private international law is that the *lex loci* governs matters relating to immovable property and law of the domicile governs personal relations.

‘DOMICILED’

The Act applies to all Hindus who are within the territories of India and also to all Hindus outside the said territories who are domiciled in India. The generally accepted definition of ‘domicile’ and one approved of by the Supreme Court though not an absolute one is:

That place is properly the domicile of a person in which his habitation is fixed without any present intention of removing there from.

The two constituent elements for the existence of domicile which may now be taken as accepted law are: (1) a residence of a particular kind; and (2) an intention of a particular kind. As the Supreme Court has pointed out:³⁰

there must be the factum and there must be the animus. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside forever in the country where the residence has been taken up.

It is also a well-established proposition that a person may have no home but he cannot be without a domicile. In order to make the rule that nobody can be without a domicile, effective, the law assigns what is his birth. This prevails until a new domicile has been acquired, so that if a person leaves the country of his origin with an undoubted intention of never returning to it again, nevertheless his domicile of origin adheres to him until he actually settles with the requisite intention in some other country.³¹

The broad principles enunciated by courts in England on the question of domicile have generally been accepted and applied by courts in India. Briefly stated, they are summarised in the decision of the Supreme Court in the *Central Bank* case *supra*.

Section 2 makes it abundantly clear that the Act applies to all Hindus who are within the territories of India. It is not necessary that they should

³⁰ *Central Bank of India Ltd v Ram Narain* AIR 1955 SC 36; *Gour Gopal Roy v Sipra Roy* AIR 1978 Cal 163; *Moina Khosla v Amardeep Khosla* AIR 1986 Del 399 (strong evidence required to prove abandonment).

³¹ *Central Bank of India Ltd v Ram Narain* *supra*.

be domiciled in India. This intra-territorial aspect is not controlled by domicile. Thus, for instance, a Nepali of *Gorkha* tribe residing in India and describing himself as Hindu by creed and married to a Hindu girl according to Hindu rites in India would be governed by this Act.³² *Gorkhas* are regarded normally as Hindus.

It is well-established, in matters of conflicts of law, that the question whether a particular marriage was properly solemnised must be decided on the basis of the law of the land in which such marriage took place.

Citizenship is not a necessary or imperative qualification for application of the Act. The question of domicile assumes importance when one of the parties to a marriage performed in India is a foreigner and the marriage is prohibited by the law of the country to which such foreigner belongs.

2. Application of Act.—(1) This Act applies—

- (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;
- (b) to any person who is a Buddhist, Jaina or Sikh by religion; and
- (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:

- (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
- (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and
- (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled

³² *Prem Singh v Dulhari Bai* AIR 1973 Cal 425.

Tribe within the meaning of clause 25 of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

PERSONS GOVERNED BY THE ACT

The word 'Hindu' does not denote any particular religion or community. During the last hundred years and more, it has been a nomenclature used to refer comprehensively to various categories of people for purposes of personal law. It has been applied to dissenters and non-conformists and even to those who have entirely repudiated *Brahmanism*. It has been applied to various religious sects and bodies which at various periods and in circumstances developed out of, or split off from, the Hindu system but whose members have nevertheless continued to live under the Hindu law and the courts have generally put a liberal construction upon enactments relating to the personal laws applicable to Hindus. In the note to cl 2 of the Hindu Marriage Bill, it was observed:

At present, Hindu law applies: (i) to Hindus by birth, and to Hindus by religion, that is to say, to converts and re-converts to Hinduism; (ii) to illegitimate children where both parents are Hindus; (iii) to illegitimate children where the mother is a Hindu and the children are brought up as Hindus; (iv) to Brahmos, Arya Samajists, Lingayats and to persons who may have deviated from orthodox standards of Hinduism in matters of diet and ceremonial observances and to every other person who may be regarded as Hindu unless he can show some valid local, tribal and family custom to the contrary; and (v) to Jains, Sikhs and Buddhists.

This section in effect seeks to codify the existing law on the question. It has been held in the undermentioned case that the Act can apply even to a person who though a Hindu when the marriage was solemnised has ceased to be one by thereafter changing religion.³³

SUB-SECTION (1)(A): HINDU

The words in this sub-section 'any person, who is a Hindu by religion in any of its forms and developments' give legislative approval to the numerous decisions of courts on the subject, noted in § 6 (Vol 1), including pronouncements of the Judicial Committee of the Privy Council. In a judgment of the Calcutta

33 *Vilayat Raj v Sunila* AIR 1983 Del 351.

High Court in a matter which was ultimately decided by the Privy Council, it was observed:

The Hindu religion is marvellously catholic and elastic. Its theology is marked by eclecticism and tolerance and almost unlimited freedom of private worship. Its social code is much more stringent, but amongst its different castes and sections it exhibits wide diversity of practice.³⁴

Reference may also be made to the undermentioned decisions of the Supreme Court.³⁵

SUB-SECTION (1)(B)

The Act applies not merely to Hindus by religion but also to persons who profess the Buddhist, Jain or Sikh religion. Persons who profess any of these four religions are included in the wide category of persons governed by this Act.

The effect of the four new Acts is to give legislative sanction to the existing previous law that even though Jains may not be Hindus by religion, they are to be governed by the same law as the Hindus.

SUB-SECTION (1)(C)

It is not a mere laconism to observe that for the purposes of this Act it is easier to say who are not Hindus or that the practical separation of Hindus from non-Hindus is not a matter of much difficulty. This sub-section adopts the negative form and in effect lays down that it is to be presumed, until the contrary is proved, that any person who is not a Muslim, Christian, Parsi or Jew by religion is governed by this Act. The purpose is to avoid as far as possible detailed and at times complex inquiries into the matter.

DOMICILED

Reference may be made to notes under 'domiciled'.

EXPLANATION (B)

This *Explanation* deals with legitimate children of mixed marriages where one of the parent is a Hindu, Buddhist, Jain or Sikh. It also deals with

³⁴ *Bhawan Koer v Bose* (1904) 31 Cal 11, 15.

³⁵ *Commr of Wealth Tax v R Sridharan* (1976) 1 SCC 489, 493-96; *Yagnapurushdasji v Muldas* AIR 1966 SC 1119 (for the broad features of the Hindu religion and a discussion of the subject); *K Derabalan v M Vijayakumari* AIR 1991 Ker 175; *Suraymani Stella Kunur (Dr) v Durga Charan Hansdah* (2001) 2 IT 631 (Act not applicable to *santhal* tribe).

illegitimate children, one of whose parent is a Hindu, Buddhist, Jain or Sikh. Such legitimate or illegitimate children, if brought up in the religion of any such parent, are governed by the Act. Reference may be made to the undermentioned case.³⁶

EXPLANATION (C)

This *Explanation* gives legislative sanction to the view that conversion or reconversion of any person to Hindu religion, whatever be the other faith to which that person might have belonged or been converted to, attracts with it the application of the Act. A European does not become a Hindu merely because he professes a theoretical allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism and its practices. However, if he abdicates his religion by a clear act of renunciation and can be said to have in fact adopted the Hindu religion, he may justly be regarded as a Hindu within the meaning of that expression as understood in this Act. The best evidence of such conversion would be an actual formal conversion.³⁷

SUB-SECTION (2): SCHEDULED TRIBES

Clause 25 of art 366 of the Constitution defines the expression 'Scheduled Tribes' and art 342 enacts the manner in which these tribes may be notified. This was done by the Constitution (Scheduled Tribes) Order 1950, and by the Constitution (Scheduled Tribes) Order 1951. The present sub-section has the effect of laying down that, the persons belonging to such notified tribes will in matters of marriage, continue to be governed by the personal law which was hitherto applied to them and not by any of the provisions of this Act, unless the Central Government by notification directs that any such provisions should be applicable to them.³⁸

In case of persons belonging to notified tribes, since the Act will not apply, and if there is no tribal custom prohibiting a second marriage, it would be permissible and would not attract the penal provisions under s 494 of the Indian Penal Code 1860.³⁹

³⁶ *Rosa Marie v Commr of Wealth Tax* AIR 1970 Mah 249.

³⁷ *Ratansi v AG of Madras* (1929) 52 Mad 160; *Muthusami v Masilamani* (1909) 33 Mad 342, where earlier decisions are reviewed.

³⁸ *Dasarath v Guru Bewa* AIR 1972 Ori 78 (Act is not applicable to members of Bathudi sub-caste). *Jagannath Sahar v Gana Bewa* AIR 1990 Ori 164; *Sapna Jacob v State of Kerala* AIR 1993 Ker 75 (person born of Hindu mother and Christian father—must prove by conduct an intention to be called a Hindu).

³⁹ *Surajmani Stella Kujur (Dr) v Durga Charan Hansdah* (2001) 2 JT 631.

SUB-SECTION (3)

This sub-section is enacted to make it abundantly clear that the expression 'Hindu' wherever used in the Act is to be understood in the inclusive and comprehensive significance given to it in this section. (Also, see 'Persons governed by the Act').

3. Definitions.—In this Act, unless the context otherwise requires:

- (a) the expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

- (b) 'district court' means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;
- (c) 'full blood' and 'half blood'—two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives;
- (d) 'uterine blood'—two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation.—In clauses (c) and (d), 'ancestor' includes the father and 'ancestress' the mother;

- (e) 'prescribed' means prescribed by rules made under this Act;
- (f) (i) '*sapinda* relationship' with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;
- (ii) two persons are said to be '*sapindas*' of each other if one is a lineal ascendant of the other within the limits of *sapinda*

relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them;

(g) 'degrees of prohibited relationship'—two persons are said to be within the 'degrees of prohibited relationship'—

- (i) if one is a lineal ascendant of the other; or
- (ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or
- (iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or
- (iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children or brother and sister or of two brothers or of two sisters.

Explanation.—For the purposes of clauses (f) and (g), relationship includes—

- (i) relationship by half or uterine blood as well as by full blood;
- (ii) illegitimate blood relationship as well as legitimate;
- (iii) relationship by adoption as well as blood;

and all terms of relationship in those clauses shall be construed accordingly. .

It will be seen that the definitions given in this section are not all intended to economise words or to serve merely as a little dictionary. Most of the definitions lay down legal principles.

'UNLESS THE CONTEXT OTHERWISE REQUIRES'

The definitions and abbreviations given in this section have to be read subject to the qualification that their application must not be inconsistent with the context or subject matter. Even when an Act contains a section giving definitions the latter may not be applicable in all the contexts. Where there is something repugnant in the context showing that the definition will not fit, the court will give such meaning to the expression as will be more in harmony with the context and allow it to prevail over the 'artificial conceptions' of the definition clause.

CLAUSE (A) 'CUSTOM': 'USAGE'

It is generally said that custom must be ancient, certain and reasonable. It will be noticed that the definition in cl (a) does not use the expression 'ancient' but speaks of the observance of a custom or usage 'for a long

time'. The English rule that 'a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary' has not been strictly applied to Indian conditions. All that is necessary to prove is that the custom or usage has been acted upon in practice for such a long period and with such invariability and continuity as to show that it has by common consent been submitted to as the established governing rule in any local area, tribe, community, group or family.⁴⁰ Certainty and reasonableness are also indispensable elements of the rule. An essential attribute of a valid custom and one emphasised in this clause is that it must not be opposed to public policy. The determination of what is opposed to the so-called public policy or policy of the law has necessarily varied from time to time. While the principles underlying the rule do not vary, the application of the rule must in a large measure depend upon public opinion and current notions of what is good for the public. One test, which may help, is that the custom or usage must have no general tendency to do wrong or injury. Each case of custom or usage must rest upon its own peculiar nature and facts and no hard and fast rule can be laid down.⁴¹

CLAUSE (B): 'DISTRICT COURT'

The expression 'District' as defined in s 2(4) of the Code of Civil Procedure 1908 means 'the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a 'District Court'), and includes the local limits of the ordinary original civil jurisdiction of a High Court'. Following this definition the expression 'District Court' must be understood to include a High Court in the exercise of its ordinary original civil jurisdiction.⁴² However, when there is a city civil court the city civil court, alone and not the High Court would be the 'District Court' for the purposes of this Act. Section 19 of the Act deals with jurisdiction and lays down that, Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnised or the husband and wife reside or last resided together.⁴³

CLAUSE (C) AND (D): 'FULL BLOOD: HALF BLOOD: UTERINE BLOOD'

Question of relationship subsisting between the parties to a marriage becomes material when dealing with restrictions arising from *sapinda* relationship and

⁴⁰ *Lajva Devi v Kamla Devi* AIR 1993 J&K 31 (custom must be acted upon for a long time).

⁴¹ See §§ 15–20 (Vol 1) *ante* and s 4 *post*.

⁴² *Kedarnath v Gonesh* (1907) 12 CWN 446.

⁴³ See notes under s 19 *post*.

degrees of prohibited relationship because subject to limited exceptions there are certain prohibitions which are absolutely imperative in their nature. Relationship by full blood or half blood or uterine blood or by adoption may bring the parties within those imperative bars and render void the marriage between them.

CLAUSE (E): 'PRESCRIBED'

The Act lays down in s 8 that the state government may make rules relating to registration of marriages. Section 14 empowers the High Court to make certain rules and s 21 confers rule-making powers on the High Court for regulating the procedure to be followed in case of petitions under the Act.

CLAUSE (F): 'SAPINDA RELATIONSHIP'

Clause (f) of this section defines *sapinda* relationship by laying down the manner of computing degrees of ascent and relationship for the purpose of marriage. Section 5 cl (v) lays down as one of the conditions of valid marriage that the parties must not be *sapindas* of each other unless there is a custom or usage governing each of them which permits of a marriage between them. Unless under the old law, *sapinda* relationship was of primary importance in matters of succession to the property of a male Hindu and *sapindas* belonged to the first class of heirs, the different classes of heirs recognised by Mitakshara and Dayabhaga have now ceased to exist in case of devolution of property of a male Hindu and the new scheme of succession evolved by the Hindu Succession Act 1956, does not proceed with *sapinda* relationship as the indispensable starting point. *Sapinda* relationship was also a governing consideration in determining prohibited degrees of marriage. The concept of *sapinda* relationship appears to have been retained in the present Act as more convenient in dealing with the question of degrees of prohibited relationship in marriage. The five and three degrees mentioned in the definition are of vital importance and the rule requires to be carefully applied. The note to cl 3 of the Hindu Marriage and Divorce Bill states that the strict rule prohibiting marriage within the limits of *sapinda* relationship as defined in the *smritis* (seven and five degrees) have been considerably relaxed by custom and the limits have therefore, been reduced to five and three degrees, as is generally recognised now. Not only has the *sapinda* relationship been interpreted in different ways by different authors, but also, the rule itself has been subject to modification by custom. Some definite limits had therefore, to be provided for, which accord with judicially recognised customs or well-established customs.

The general rule, therefore, is that no valid marriage can take place between two persons who are *sapindas* of each other as defined in this

clause. This clause read with the *Explanation* added at the end of the section principally rules that:

- (i) *Sapinda* relationship extends as far as the third generation in the line of ascent through the mother in case of both the parties.
- (ii) *Sapinda* relationship extends as far as the fifth generation in the line of ascent through the father in case of both the parties.
- (iii) *Sapinda* relationship may subsist in case of both the parties through the father or in case of both through the mother; or it may subsist in case of one of them through the father and in case of the other through the mother.
- (iv) The line is traced upwards in case of both the parties counting each of them as the first generation; the generations in the line of ascent whether three or five are to be counted inclusive of the persons concerned and the common ancestor or ancestress.
- (v) The line of ascent to be traced is not restricted to male ancestors. Thus, for instance a person's father's mother's father is also his father's father are in the line of ascent through the father. Similarly, the mother's mother and mother's father are in the line of ascent through the mother. The computation of generations as such cannot present any difficulty but question may arise, from the retention by the legislature of the expression *sapinda* relationship, whether the line must pass only through male ascendants of the father or may pass through male or female ascendants of the father without differentiating between such ascendants. There was an irreconcilable conflict of view on the question under the old law in dealing with *sapinda* relationship as understood in the context of prohibited degrees of marriage and the relevant texts were differently interpreted. Even if reference to the old law on the subject is deemed permissible, no useful guidance can be derived by reverting to the controversy under the old law, however interesting the subject may be. The use of the word 'through' in the expression 'in the line of ascent through the father' and the word 'generation' which means a single succession in natural descent, indicate that the relationship is not confined to the case of direct male ascendants of the father and it is submitted that the language used must be understood as comprehending both male and female ascendants of the father so that in tracing the line of ascent to the fifth generation through the father there can be the intervention of both male and female ascendants. Moreover, there is independent intrinsic evidence, which supports this construction and that is the use of the expression 'lineal ascendant' in cl (f)(ii), which is also used in cl (g). In a latter clause, it is obvious that the expression 'lineal ascendant' applies both to the male and female ascendants of a father and mother.

The *Explanation* also supports this construction. It may be said on the other hand that while one's own maternal line is shortened to three generations, there is no reason why the father's maternal line or even the father's mother's maternal line should feature in the computation and largely increase the number of *sapinda* relations. The language of the clause, however, supports the construction submitted above.

- (vi) *Sapinda* relationship includes relationship by half or uterine blood as well as by full blood and by adoption. It also includes both, legitimate and illegitimate blood relationship.

The following diagram will enable the reader to understand the rules applicable in determining *sapinda* relationship in respect of marriage (through the bridegroom's father).

In the diagram *A* is the bridegroom, *F* is his father, *F1* to *F4* are his father's paternal ancestors. *FM* is his father's mother; and *FMF*, *FMFF* and *FMFFF* are his father's mother's paternal ancestors. *S*, *SS*, *SSS*, *SSS1* and *SSSS* are the son, grandson, great grandsons and great great grandson of *F3*. *B* is another son of *FMFF*. *D1* to *D11* are all females, relationship between whom and *A* is to be considered.

(a) *F3*, the common ancestor of *A* and *D2*, is the father's father's father's father of *A* and the mother's father of *D2*. As *F3* is the fifth generation from *A* in *A*'s father's line and the third generation from *D2* in her mother's line, *A* and *D2* are *sapindas* of each other.

(b) *F3*, the common ancestor of *A* and *D4*, is the father's father's father of *A* and the mother's father's father of *D4*. *F3* is the fifth generation from *A* in *A*'s father's line but he is the fourth generation from *D4* in her mother's line, *A* and *D4* are, therefore, not *sapindas*. *D3*, however, is a *sapinda* of *A*.

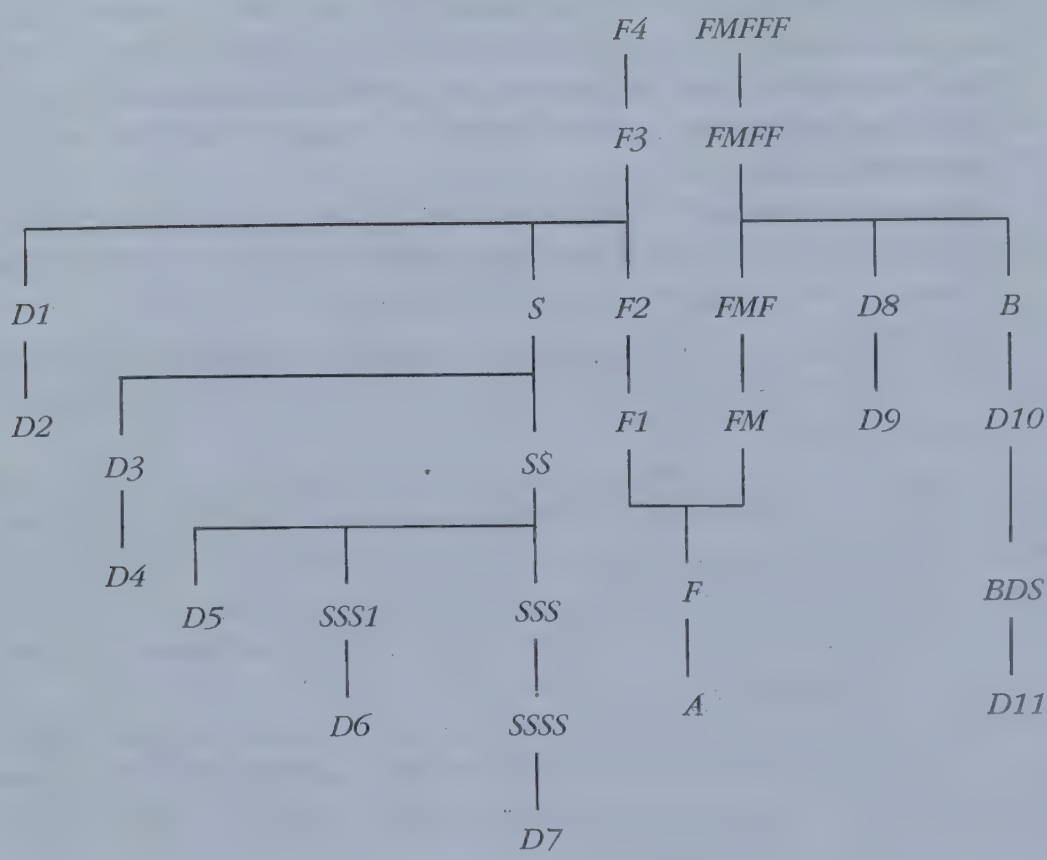
(c) *F3* in the above diagram is the fifth generation from *A* in *A*'s father's line. He is in the fourth generation from *D5* in her father's line; and the fifth generation from *D6* in her father's line. *A* is *sapinda* of *D5* and also of *D6*. *A* is not, however, a *sapinda* of *D7* because *F3* is in the sixth generation from *D7* in her father's line.

(d) *F4* is the sixth generation from *A* in *A*'s father's line. So no *sapinda* relationship can exist between *A* and any female descendant of *F4* (other than in the line of *F3*) although such female descendant may not be removed from *F4* by more than the specified number of generations.

(e) *FMFFF* also is the sixth generation from *A* and the position of *A* and any female descendant of *FMFFF* (other than in the line of *FMFF*) will be the same as in the previous Illustration.

(f) *FMFF*, the common ancestor of *A* and *D9*, is the father's mother's father's father of *A* and the mother's father of *D9*. As *FMFF* is the fifth generation from *A* in *A*'s father's line and the third generation from *D9* in her mother's line, *A* and *D9* are *sapindas* of each other.

Table 1.1



(g) *FMFF*, the common ancestor of *A* and *D11*, is the father's mother's father of *A* and the father's mother's father of *D11*. As *FMFF* is the fifth generation from *A* in *A*'s father's line and the fifth generation from *D11* in her father's line, *A* and *D11* are *sapindas* of each other.

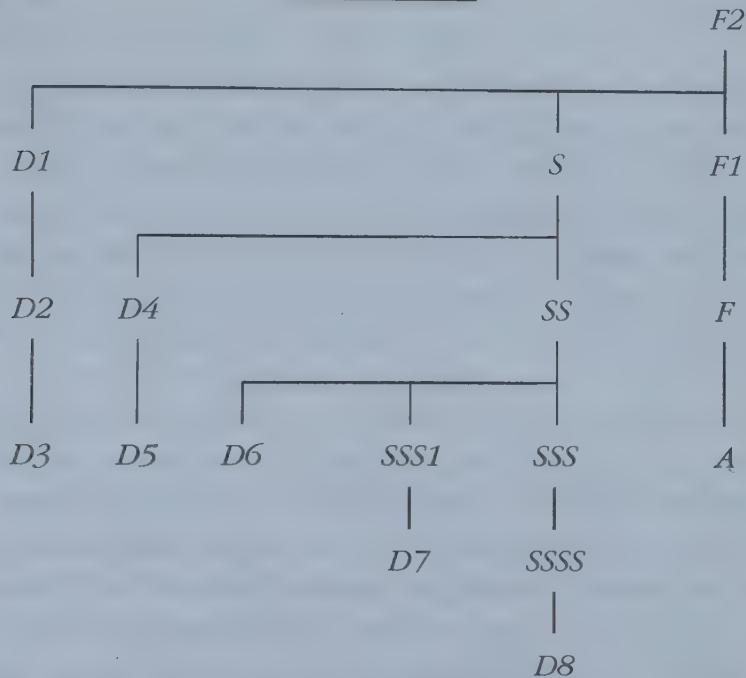
In table 1.2, *A* is the bridegroom. *F2* is his father's father's father. *S*, *SS*, *SSS*, *SSS1* and *SSSS* are the son, grandson, great grandsons and great great grandson of *F2*, *D1* to *D8* are all females, relationship between whom and *A* is to be considered.

(a) *F2*, the common ancestor of *A* and *D1* to *D8*, is the fourth generation from *A* in *A*'s father's line. He is the third generation from *D2* in her mother's line and the fourth generation from *D3* in her mother's line. *A* and *D2* are *sapindas* but *A* and *D3* are not *sapindas* of each other.

(b) *A* and *D4* are *sapindas* of each other because *F2* the common ancestor is the fourth generation from *A* in *A*'s father's line and the third generation from *D4* in her father's line; but *A* and *D5* are not *sapindas* of each other because *F2* the common ancestor is in the fourth generation from *D5* in her mother's line.

(c) *A* and *D6* are *sapindas* of each other because *F2* the common ancestor, is the fourth generation from *A* in *A*'s father's line, and the fourth generation from *D6* in her father's line.

Table 1.2

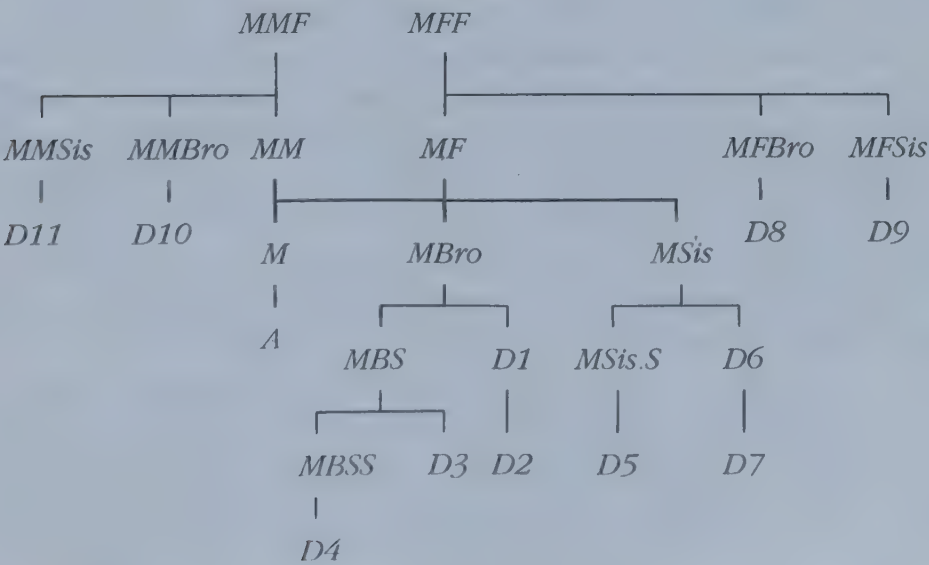


(d) A and D7 are *sapindas* of each other because F2 the common ancestor is the fourth generation from A in A's father's line and the fifth generation from D7 in her father's line.

(e) A and D8 are not *sapindas* of each other because F2 the common ancestor though the fourth generation from A in A's father's line is the sixth generation from D8 in her father's line.

The following diagram will enable the reader to understand the rules applicable in determining *sapinda* relationship in respect of marriage (through the bridegroom's mother):

Table 1.3



In the above diagram *A* is the bridegroom; *M* is his mother; *MF* is his mother's father; *MM* is his mother's mother. *MFF* is his mother's father's father, *MMF* is his mother's mother's father, *MFBro* is his mother's father's brother, *MFSis* is his mother's father's sister; *MBro*, is his mother's brother, *MSis* is his mother's sister; *MMBro* is his mother's mother's brother, *MMSis* is his mother's mother's sister. *MBS* is his mother's brother's son; *MBSS* is his mother's brother's son's son and *MSis.S* is his mother's sister's son. *D1* to *D11* are all female relationships between whom and *A* is to be considered.

(a) *MF* is the common ancestor of *A* and also of *D1* and *D2*. *D1* is *A*'s mother's brother's daughter. *MF* is in the third generation from *A* in *A*'s mother's line and also in the third generation from *D1* in her father's line. *A* and *D1* are *sapindas* of each other. (It will be seen from cl (g) that they are also within the degrees of prohibited relationship being children of brother and sister). The relationship of *A* and *D2* is, however, different. Although *MF*, the common ancestor is in the third generation from *A* in *A*'s mother's line, he is in the fourth generation from *D2* in *D2*'s mother's line. *A* and *D2* are, therefore, not *sapindas* of each other. It will also be seen that they are not within the prohibited degrees of relationship under cl (g).

(b) *MF* is the common ancestor of *A* and also of *D3* and *D4*. *D3* is *A*'s mother's brother's son's daughter and *D4* is *A*'s mother's brother's son's son's daughter. *MF* is the third generation from *A* in *A*'s mother's line; in the fourth generation from *D3* in *D3*'s father's line; and in the fifth generation from *D4* in *D4*'s father's line. *A* and *D3* are, therefore, *sapindas* of each other. So also, *A* and *D4* are *sapindas* of each other.

(c) *MF* is the common ancestor of *A* and *D5*. *D5* is *A*'s mother's sister's son's daughter. *MF* is the third generation from *A* in *A*'s mother's line and the fourth generation from *D5*'s father's line. *A* and *D5* are therefore, *sapindas* of each other.

(d) *MF* is the common ancestor of *A* and also of *D6* and *D7*. *D6* is *A*'s mother's sister's daughter. *MF*, the common ancestor, is the third generation from *A* in *A*'s mother's line and the third generation from *D6* in *D6*'s mother's line. *A* and *D6* are, therefore, *sapindas* of each other. (It will be seen from the cl (g) that they are also within the degrees of prohibited relationship being children of two sisters). The relationship of *A* and *D7* is, however, different. Although *MF*, the common ancestor, is in the third generation from *A* in *A*'s mother's line he is in the fourth generation from *D7* and *D7*'s mother's line. *A* and *D7* are, therefore, not *sapindas* of each other. It will also be seen that they are not within the degrees of prohibited relationship under clause (g).

(e) *MFF* is the fourth generation from *A* in *A*'s mother's line. So no *sapinda* relationship can exist between *A* and any female descendant of *MFF* (other than in the line of *MF* to which *A* himself belongs) although the latter may not be removed from *MFF* by more than the specified number of generations. Thus, in the diagram above, *D8* who is *A*'s mother's father's

brother's daughter and *D9* who is *A*'s mother's father's sister's daughter, although they are only in the third generation from *MMF*, the common ancestor, are not the *sapindas* of *A*.

(f) Similarly *MMF* is the fourth generation from *A* in *A*'s mother's line. So no *sapinda* relationship can exist between *A* and any female descendant of *MMF* (other than in the line of *MM* to which *A* himself belongs). Thus, in the diagram above, *D10* who is *A*'s mother's mother's brother's daughter and *D11* who is *A*'s mother's mother's sister's daughter, although they are only in third generation from *MMF* the common ancestor, are not the *sapindas* of *A*.

EXPLANATION

Sub-clauses (i)–(iii) of the *Explanation* relate to cl (f) and (g) and expressly state that the relationship between the parties who are *sapindas* of each other or between the parties as being within prohibited degrees is to be understood as including relationship by half or uterine blood as well as by full blood, and also by adoption. The relationship is also to be understood as including both legitimate and illegitimate blood relationship.

Section 12 of the Hindu Adoptions and Maintenance Act 1956, contains a rule similar to the rule in sub-cl (iii) of the *Explanation*. It lays down that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption. That rule, therefore, applies to relationship for all purposes including the bar of *sapinda* relationship and degrees of prohibited relationship. It may also be noted that, as laid down in proviso (a) to that section, an adopted child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth. Reference may also be made to the notes under s 12 of the Hindu Adoptions and Maintenance Act 1956.

Illustrations

- (i) In illustration (a) above, *A* and *D2* are shown to be *sapindas* of each other. It will not make any difference whether *F2* and *D1* were related by full blood or half blood. It will not make any difference if *D1* was not the daughter of *F3* and full sister of *F2* but was the uterine sister of *F2*. Similarly, in illustration (b) above, it will not make any difference whether *F2* and *S* were full brothers or half brothers or uterine brothers.
- (ii) In illustration (f) above, *A* and *D9* are shown to be *sapindas* of each other. It will not make any difference whether *EMF* and *D8*, the mother of *D9* were related by full blood or half blood. It will not make any difference if *D8* was not the daughter of *EMF* and

- full sister of *FMF* but was the uterine sister of *FMF*. Similarly, in illustration (g) above, it will not make any difference whether *FMF* and *B* were full brothers or half brothers or uterine brothers.
- (iii) In illustration (a) above, *A* and *D1* are shown to be *sapindas* of each other. It will not make any difference whether *M* and her brother, who is the father of *D1*, were related by full blood or half blood. It will not make any difference if the father of *D1* was not the son of *MF* and full brother of *M* but was the uterine brother of *M*. Similar will be the position of *A* in case of *D3* and *D4* in illustration (b) above, and it will not make any difference whether *M* and her brother, the lineal ascendant of *D3* and *D4*, were full brother and sister, or half brother and sister or uterine brother and sister. Similar also will be the position of *A* in case of *D5* and *D6* in illustrations (c) and (d) above, and it will not make any difference whether *M* and her sister, the lineal ascendant of *D5* and *D6*, were full sisters or half sisters or uterine sisters.
- (iv) *A* is the legitimate son of his parents *F* and *M*. *D* is the legitimate daughter of her parents *F1* and *M1*. *M* and *M1* were the illegitimate daughters of their mother *MM*. *MM* is the third generation in the line of ascent through the mother, in the case of both *A* and *D*. *A* and *D* are *sapindas* of each other although they are related only by illegitimate blood relationship.
- (v) In illustration (a) above, *A* and *D1* are shown to be the *sapindas* of each other. It will not make any difference that there was illegitimate blood relationship between them. Thus *D1* will be a *sapinda* of *A* even if *M* and the father of *D1* were not related by any legitimate blood relationship but were related by illegitimate blood relationship.
- (vi) In illustration (g) above, *A* and *D11* are shown as *sapindas* of each other. *FMFF* is the fifth generation from *A* in *A*'s father's line and the fifth generation from *D11* in her father's line. It will make no difference to the *sapinda* relationship for marriage between them that *FMF* and *B* were not brothers by legitimate relationship and were related only by illegitimate blood relationship.

The *Explanation* speaks of relationship by blood or adoption. Relationship by marriage is not by itself an impediment to marriage. Thus, a man may marry his deceased or divorced wife's sister or the daughter of such sister.

CLAUSE (G): 'DEGREES OF PROHIBITED RELATIONSHIP'

Clause (g) of the section defines degrees of prohibited relationship. Section 5(iv) lays down as one of the conditions of a valid marriage that the parties

must not be related to each other within the prohibited degrees, unless such marriage is sanctioned by custom or usage governing both the parties. The rules laid down in this clause relating to *sapinda* relationship are based on the principle of exogamy. The general rule of Hindu law was that parties to a marriage should not be *sapindas* of each other. However, this relationship was interpreted in different ways and the rule itself has been subjected to modification by custom. A definition of 'prohibited degrees' was necessary because there was great diversity among Hindus in different parts of India as to what were the prohibited degrees of marriage. Some limit had to be prescribed to prevent incestuous marriages and it was necessary that the rules should, if possible, be in conformity with the principles of exogamy and eugenics which were all the basis of the ancient rule which prohibited marriages between persons belonging to the same *gotra* or the same *pravara*. Custom had materially modified the rigour of that rule and the rules laid down in this and the preceding clause obviously aim at uniformity and certainty on this important question. It will be noticed that in some cases, the prohibition laid down in cl (f) and (g) will be overlapping.

The degrees of prohibited relationship enumerated in sub-cl (i)–(iv) of cl (g) are between persons of very close relationship some of them being related only by marriage. Sub-clauses (ii) and (iii), which refer to wives or some very close relations, including persons with whom relationship by marriage may have ceased to subsist by reason of divorce or remarriage. Thus, for instance, a wife of the brother or of the father's brother or of the mother's brother would be within the degrees of prohibited relationship under sub-cl (iii) even if she had been divorced or even if she had been remarried to some other person after divorce or death of that brother or father's brother or mother's brother and the subsequent marriage had ceased to subsist.

EXPLANATION

See notes under '*Explanation*'.

4. Overriding effect of the Act.—Save as otherwise expressly provided in this Act,—

- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) any other law in force immediately before the commencement of this Act shall cease to have effect insofar as it is inconsistent with any of the provisions contained in this Act.

OVERRIDING EFFECT OF THE ACT

The section gives overriding application to the provisions of the Act and in respect of any of the matters dealt with in the Act, it repeals in effect all existing laws, whether in the shape of enactments or otherwise, which are inconsistent with this Act. As already pointed out, the Act brings about some fundamental and radical changes in the law relating to marriage and the result is that immediately on the coming into operation of the Act, the law relating to marriage, whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having the force of law, ceases to have effect with respect to all matters dealt with in the Act. The Act practically supersedes the rules of the law relating to marriage contained in any Central or State enactment and any other law in force immediately before it came into operation by enacting that all such laws shall cease to have effect insofar as they are inconsistent with any provisions contained in this Act.

The Act is a codifying enactment. It does not merely crystallise or declare the existing law upon the subject by deliberately departing from the law in respect of various matters. It supersedes prior law and lays down the whole of the law relating to marriage in the form of a Code and so far as it goes, must be read as a complete enactment. Therefore, in matters governed by the enactment, appeal to any rule of law previously applicable to Hindus is now permissible only if no provision for the same is made in the Act.⁴⁴ Matters expressly saved from the operation of the Act, of course, continue to be governed by the previous law, statutory or otherwise.⁴⁵ It may also be noted that the section is not retrospective in its operation.⁴⁶

It will be noticed that the section has a characteristic marginal note 'Overriding effect of the Act' which clearly shows the general trend of the section. In some states, divorce has already been allowed on certain grounds as the result of legislation, and the object of the present Act was to lay down a uniform and comprehensive law governing all Hindus. It will be seen from s 30 of the Act and the notes thereunder that the Act repeals some of those statutes and does not seek to repeal all of them. Therefore, the legislature having expressly repealed certain Acts by s 30, had to deal with other laws which continued on the statute book and which might have provisions with regard to matters dealt with in this Act. It is with regard to those matters where provision is made under sub-s (b) of this section to those laws to the extent that they deal with matters which are inconsistent with the provision of this Act shall cease to have validity and effect.

Reference may be made to ss 29 and 30 of the Act which deal with savings and repeals.

⁴⁴ *Robini Kumari v Narendra Singh* AIR 1972 SC 459.

⁴⁵ See s 29 *post*.

⁴⁶ Reference may be made to notes under s 4 of the Hindu Adoptions and Maintenance Act 1956, *post*.

‘SAVE AS OTHERWISE EXPRESSLY PROVIDED IN THIS ACT’

The initial words of ss 4 and 29 may be read together. Matters expressly saved from the operation of the Act continue to be governed by the previous law, statutory or otherwise.⁴⁷

One outstanding exclusion from the operation of the Act is contained in s 29(4) and relates to marriages solemnised under the Special Marriage Act 1954, whether the marriage was solemnised before or after the commencement of this Act. Such marriages are not affected nor governed by any provision contained in this Act but are regulated by the provisions of that special enactment (see Introductory Note).

Another important saving is contained in s 29(2) of this Act which enacts that nothing contained in this Act shall be deemed to affect any right recognised by custom⁴⁸ or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after the commencement of this Act.

Reference may also be made to s 5(iv), (v) and s 7.

ACT IS NOT RETROSPECTIVE IN ITS OPERATION

It is a fundamental and firmly established rule of interpretation that a statute which deals with rules of substantive law, shall not be construed to have retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary implication. The general rule is that where a statute is passed, altering the law, it is to be presumed as intended to apply to a state of facts coming into existence after the Act. A necessary and logical corollary to the rule that retrospectivity is not to be presumed is that even in case of a statute intended to affect existing rights, it is not to be construed to have any greater retrospectivity than is rendered necessary by the language used, unless to do so would result in absurdity or any anomalous situation. In these matters, the courts have been more guided by considerations of substantial justice and convenience than rigid attention to strict grammatical form. There is the clear indication in this section—given by the words ‘shall cease to have effect’—and in some other important sections of the Act that it is not intended that they should have retrospective effect. A contrary rule would obviously have disastrous consequences and result in manifest injustice.

The general rule that an enactment like the present should operate

⁴⁷ Thus, for instance, provisions of Travancore Ezhava Act, which is a special enactment, are operative; *Vasappan v Sarada* AIR 1958 Ker 39 (FB). Reference may be made to notes under s 29 and decisions cited therein.

⁴⁸ See notes under s 29 *post*.

prospectively and not retrospectively—*nova constitutio futuris formam imponere debet*—has been accepted by the legislature and the exceptions to its application in the Act are indeed few. The word ‘retrospective’ is used in several different senses. A statute is ‘not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing’.⁴⁹ Section 10 states the grounds on which judicial separation may be decreed in case of a marriage, whether solemnised before or after the commencement of this Act; s 12 lays down certain grounds on which a marriage, whether solemnised before or after the commencement of this Act becomes voidable; and s 13 lays down the grounds on which any marriage solemnised whether before or after the commencement of this Act may be dissolved. In general and substantially, they confer new rights and cannot strictly be said to have retrospective operation.

CONSTITUTIONAL GUARANTEES

There is nothing in the Constitution which renders this section or s 5 or other provisions of the Act *ultra vires* the same.⁵⁰

CHAPTER II

HINDU MARRIAGES

5. Conditions for a Hindu marriage.—A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely—

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party—
 - (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
 - (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - (c) has been subject to recurrent attacks of insanity;
- (iii) the bridegroom has completed the age of twenty-one years

⁴⁹ *Maxwell on Interpretation of Statutes*, 11th edn, 1962, p 211.

⁵⁰ *Ram Prasad v State of Uttar Pradesh* AIR 1957 All 411.

- and the bride, the age of eighteen years at the time of the marriage;
- (iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
 - (v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two.

AMENDMENTS

Clause (ii) was substituted by the Marriage Laws (Amendment) Act 68 of 1976 in place of the old cl (ii), which stated 'neither party is an idiot or a lunatic at the time of the marriage'. That was done 'to make clear the circumstances in which unsoundness of mind, mental disorder, insanity or epilepsy shall invalidate a marriage'.⁵¹

Clause (iii) was amended by raising the age of the bridegroom to 'twenty one' years from the original age of 'eighteen' years and the age of the bride to 'eighteen' years from the original age of 'fifteen' years. See Amending Act 2 of 1978—the Child Marriage Restraint (Amendment) Act 1978. Since the age of the bride was raised to 18 years, ie the age of majority, there was no question of consent of her guardian. The original cl (vi) was consequently omitted. Clause (vi) stated: 'Where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage'. Section 6, which related to 'Guardianship in marriage' was also omitted by Act 2 of 1978.

The section lays down the conditions for a Hindu marriage solemnised after the commencement of the Act. Section 5 must be read with s 7, which deals with marriage ceremonies. Non-fulfilment of the conditions relating to mental capacity and age laid down in this section do not, however, render null and void, a marriage otherwise valid.⁵²

No marriage between Hindus can be valid unless:

- (i) In the case of a marriage solemnised before the commencement of this Act, it was valid under the previous law relating to marriage; but a marriage solemnised between Hindus before the commencement of this Act, if otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different castes, for example, *Brahmin*, *Kshatriya*,

⁵¹ Notes on clauses of the Amendment Bill. *Bal Kishan v Urmila* AIR 2001 Raj 404.

⁵² See ss 11, 12(1)(c), 13(1)(iii) and 18 and notes under cll (ii) and (iii); *Mobinder Kaur v Major Singh* AIR 1972 P&H 184.

- Vaishya* or *Shudra* or to different religions, for example, Hindu, Buddhist, Jain or Sikh [s 29(1)];
- (ii) in the case of a marriage performed after the coming into force of this Act, it is solemnised in accordance with the customary rites and ceremonies of either party as laid down in s 7 and fulfills all the primary conditions affecting the validity of the same; or
 - (iii) it is a civil marriage contracted in accordance with the Special Marriage Act 1954, or previous legislation relating to civil marriages.

CONCEPTION OF A HINDU MARRIAGE UNDER THE ACT

There was some divergence of opinion on the question whether, under Hindu law as applied by courts in India, marriage was a sacrament or both, a sacrament and contract. That it was a sacrament was not questioned but in some cases the courts expressed the view that it was not merely a sacrament but also a civil contract. Controversy arose when the court had to determine some legal consequences of marriage and resolve certain difficult questions which arose in divorce cases under the law enacted by some states. Introduction of the principle of a civil contract while it helped to support the conclusion reached in the particular case was, however, apt to give rise to a misconception and greater difficulties in other cases. As already pointed out in the Introduction, in Hindu law the admixture of religion and ethics with legal precepts was naturally congruent. It was not possible, indeed, always to draw any hard line of logical demarcation between matters secular and religious because certain questions such as for instance marriage and adoption had the aspects of both. The demarcation between religious and legal precepts particularly on questions of marriage was rather thin and a number of questions were dealt with by the *smritikars* as appertaining to *achara* (rituals) and not to *vyavahara* (law proper). Marriage under Hindu law was primarily and essentially a sacrament. That was its religious aspect. Its secular aspect was of a gift of the bride to the bridegroom and from its very nature the elements of consensus which must accompany gift and its acceptance had to be present. Having elements both, religious and secular, it was the source and foundation of the status of the parties; and of their right to associate in religious observances and also of correlative rights and duties in temporal matters.

What is the concept of a Hindu marriage now under the Act can only be gathered from a consideration of the relevant provisions of the Act in their proper perspective. The Act overrides all the rules of the law of marriage hitherto applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law in respect of all matters dealt with in it.⁵³ A Hindu marriage under the Act must be solemnised in

⁵³ See s 4.

accordance with the customary rites and ceremonies of at least one of the parties thereto⁵⁴ and must fulfil the conditions prescribed for the same. In the Hindu Code Bill and the Bill as it emerged from the Select Committee, two kinds of marriages were recognised and there was a provision that marriage between Hindus must be either a civil marriage or a sacramental marriage and the requisite of a sacramental marriage, apart from other conditions, was that it must be solemnised in accordance with such customary rites and ceremonies of either party thereto as are essential for such marriage.

The Act does not use the expression 'sacramental marriage' but speaks of a 'Hindu marriage solemnised in accordance with the customary rites and ceremonies of either party', presumably because of the very wide connotation of the expression 'Hindu' and the inappropriateness of emphasising the sacramental aspects when the customary rites and ceremonies of one of the parties according to which a marriage is solemnised may not require any ceremonies insisted upon for a marriage which was hitherto understood as a sacrament and a gift. It is also not possible to say that the legal concept of marriage under the Act is one of contract. This does not mean that the element of consent is unimportant. There must be the consensus of the parties to the solemnisation of the marriage. This element of consent was present even in the concept of a Hindu marriage being entirely a sacrament and a gift because it was an indispensable part of the ceremony that the gift should be accepted. Section 12 (1)(c), rules that a marriage shall be voidable and may be annulled by a decree of nullity on the ground that the consent of the petitioner (or of the guardian in marriage) was obtained by force or fraud. A Hindu marriage under the Act, it is submitted, is not entirely or necessarily a sacrament (*sanskara*) but a union of one man with one woman to the exclusion of all others, satisfied by solemnisation of the customary rites and ceremonies of either party essential for a marriage, as it directly exists, creates a relation and a status not imposed or defined by contract but by law. There must be no incapacity in the parties to marry one another by reason of prohibited relationship or *sapinda* relationship. A 'Hindu marriage' does not refer to Hinduism as a religion but relates to all persons who are Hindus in the wide connotation of the expression.

SOLEMNISATION OF HINDU MARRIAGE

This section lays down the conditions for a Hindu marriage which must be fulfilled in case of any marriage between two Hindus which can be solemnised in accordance with the requirements of this Act. The word 'solemnise' means, in this connection, to celebrate the marriage with proper ceremonies and in due form. Unless the marriage is celebrated or performed with

⁵⁴ See s 7.

proper ceremonies and due form, it cannot be said to be 'solemnised'.⁵⁵ When a marriage was celebrated several decades ago, oral evidence being the only evidence available, would have to be accepted.⁵⁶ Section 7 rules that a Hindu marriage—that is, one under the present Act—must, after the commencement of the Act, be solemnised in accordance with the customary rites and ceremonies of one of the parties to it and where such rites and ceremonies include the *saptapadi* (taking of seven steps by the bridegroom and the bride jointly before the sacred fire), that ceremony must be observed. 'Solemnised' refers to the rites and ceremonies of marriage. What is required is substantial compliance with only those rites and ceremonies, performance of which is, by the customary law of either party, deemed as absolutely necessary. Non-performance of such rites and ceremonies of prime necessity would be regarded as failure to solemnise the marriage and no valid Hindu marriage can result. This is because a marriage not duly solemnised by the performance of essential ceremonies is, under the Act, no marriage at all.⁵⁷

A marriage solemnised between parties, one of whom is a Christian and the other a Hindu, cannot be dissolved under the provisions of this Act if it had been solemnised in accordance with Christian rites and ceremonies, and proceedings would not be maintainable even if one of the parties is a Hindu.⁵⁸

CLAUSE (I): MONOGAMY

Clause (i) of the section introduces monogamy which is essentially the voluntary union for life of one man with one woman to the exclusion of all others. It enacts that neither party must have a spouse living at the time of marriage. The expression 'spouse' here used, means a lawfully married husband or wife. Before a valid marriage can be solemnised, both parties to such marriage must be either single or divorced or a widow or a widower and only then they are competent to enter into a valid marriage. If at the time of performance of the marriage rites and ceremonies, one or other of the parties had a spouse living and the earlier marriage had not already been set aside, the later marriage is no marriage at all. Being in contravention of the conditions laid down in this clause, it is void *ab initio*.⁵⁹ It cannot

⁵⁵ *Bhairao v State of Maharashtra* AIR 1965 SC 1564; *Priya Bala v Suresh Chandra* AIR 1971 SC 1153.

⁵⁶ *Lakshamma v Kamamma* AIR 2001 Kant 120.

⁵⁷ See s 7 and notes under it. Reference may be made to § 437 (Vol 1). *Marriage ceremonies—Shankerappa v Sushilabai* AIR 1984 Kant 112.

⁵⁸ *Jacintba Kamath v Padmanabha Kamath* AIR 1992 Kant 372. *M Vijayabumari v K Derabalan* AIR 2003 Ket 363. *Geeta Mullick v Brojo Gopal Mullick* AIR 2003 Cal 321 (irretrievable breakdown by itself not a ground for dissolution).

⁵⁹ See s 11 and notes under it. *Parkash Chander v Parmeshvari* AIR 1987 P&H 37. *Mohmed Ibrahim v State of Uttar Pradesh* AIR 1964 SC 1625, 1631. As to presumption (of death of first husband) under s 108 of the Indian Evidence Act 1872 and the seven years rule, see *Surjit Kaur v Ghujhar Singh* AIR 1980 P&H 274.

be treated as voidable under s 12.⁶⁰ Since a second marriage, during the subsistence of the first one is void, the 'wife' of the second marriage cannot claim to succeed to the properties of the deceased spouse.⁶¹ As regards the entitlement to maintenance, attention is invited to the commentary under s 25 of this Act, and the decision of the Supreme Court in *Ramesh Chandra Daga v Rameshwari Daga*⁶², where the court has held that the spouse of a null and void union, entered into during the pendency of an earlier marriage is entitled to maintenance, on the passing of a decree of nullity.

When the wife filed an application before the court that the husband be allowed to contract a second marriage, and the court allowed the husband to do so, such marriage was void.⁶³

The general rule of matrimonial law is that, a party to a marriage of which the other party is incompetent to join in the celebration because of the existence of a previous husband or wife, is entitled, without recourse to any court, to marry anyone else because that particular marriage is not in law a marriage at all, is applicable equally well to marriages under the Act. A person, an innocent party to a bigamous marriage, may go to a court for a declaration that the bigamous marriage is null and void. That would be for the purpose of precaution or record, or evidence. However, the bigamous marriage is non-existent and simply because there is no recourse to the court, it cannot be said that it exists unless and until a decree is passed declaring it to be null and void.⁶⁴ Section 17 in terms lays down that such a marriage is null and void and imposes punishment for bigamy as provided in the Indian Penal Code 1860.

This provision which prohibits bigamy does not contravene art 25 of the Constitution.⁶⁵

A decree of divorce terminates the status of the parties as married persons and is, after such a decree, competent to remarry and the prior marriage having been dissolved is no impediment to such remarriage. Reference may be made to s 15. Divorce, though not allowed by Hindu law is by custom and usage recognised in certain communities, and remarriage of either party is also permissible. Section 29 expressly saves from the operation of the Act all rights recognised by custom or any special enactment to obtain dissolution of marriage whether solemnised before or after the commencement of this Act.

60 *Yamunabai v Anantrao* AIR 1988 SC 644.

61 *Nimbamma v Rathnamma* AIR 1999 Kant 226.

62 *Ramesh Chandra Daga v Rameshwari Daga* (2004) 10 JT 366.

63 *Santosh Kumar v Surjit Singh* AIR 1990 HP 77.

64 *William Hudson v Webster* AIR 1937 Mad 565; *Lajya Devi v Kamla Devi* AIR 1993 J&K 31 (a third aggrieved party can sue for a declaration as to a void marriage).

65 *Ram Prasad v State of Uttar Pradesh* AIR 1961 All 334.

CLAUSE (II): MENTAL CAPACITY

This clause lays down as one of the conditions for a Hindu marriage that neither party must be suffering from unsoundness of mind, mental disorder or insanity and s 12(1)(b) renders, at the instance of a party, the marriage voidable, if the other party was suffering from any such infliction at the time of the marriage.

At the time of the marriage, a party may be incapable of giving any valid consent to the same, owing to unsoundness of mind. Again, a party may, at the time of the marriage, be capable of giving consent to the marriage, but may be suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children. It can also be that a party though not suffering from any mental infliction of the nature stated above, may yet, at the time of the marriage, have been subject to recurrent attacks of insanity or epilepsy.⁶⁶ In all such cases, the party is regarded as not having the mental capacity to solemnise the marriage. It will be noticed that the expression 'mental disorder' is not defined. However, the amended provision in s 13(1)(iii) explains mental disorder and gives the expression a very comprehensive meaning. Reference may be made to notes under s 13(1)(iii). Reference may be made to notes under s 12(1)(b). Medical examination in cases of mental illness can be ordered *suo moto* or at the instance of a party to the proceedings. Such an examination is not violative of art 21 of the Constitution.⁶⁷

The Act, although it lays down in cl (ii) of this section that neither party to the marriage should be suffering from any such infliction, does not render per se void the marriage of such a person, but makes it only voidable.⁶⁸ The mere fact that there was no cohabitation cannot lead to the inference that a spouse is of unsound mind.⁶⁹

CLAUSE (III): AGE OF THE PARTIES: CONSENT

The Act does not in terms state that consent of the parties is necessary for a valid marriage but lays down the condition that at the time of marriage the bridegroom must have completed the age of 21 and the bride the age of 18 years. As pointed out under 'Amendments', the age for the bridegroom

66 *Roshan Lal v Kadembari* (1979) 81 PLR 232; *Surjit Kaur v Ujjal Singh* (1978) 80 PLR 693; *Tarlochan Singh v Jit Kaur* AIR 1986 P&H 379 (wife suffering from schizophrenia within short period after marriage—living with husband—disease not disclosed before marriage); *Praveen Kumari v Manmohan Kumar* AIR 1984 P&H 221 (custom proved); *Alka Sharma v Abhinesh Sharma* AIR 1991 MP 205 (a nullification of marriage under this clause 5(ii)(b) can be made if either or both conditions exist).

67 *Sharada v Dharampal* AIR 2003 SC 3450.

68 Section 12(1)(b) *post*.

69 *Laxmi Narayan v Santhi* AIR 2001 SC 2110.

was raised to 21 from 18 and the age for the bride was raised to 18 from 15. In case the bride was under 18, the consent of her guardian in marriage was necessary. Absence of consent of the parties or of the guardian of the bride did not, however, render the marriage void or even voidable if otherwise it was duly solemnised and the prime conditions were fulfilled. However, a marriage may be annulled by a decree of nullity under s 12(1)(c) on the ground that the consent of the petitioning spouse or the guardian in marriage of the petitioner was obtained by force or fraud. Reference may be made to notes under s 12(1)(c) and s 13(2)(iv).

A marriage solemnised in violation of the requirement as to age laid down in this clause is not void or even voidable, but the contravention of the condition is punishable as an offence under s 18 of the Act.⁷⁰

The legislature has for valid reasons, thought it fit to exclude sub-s (iii) of s 5 from the grounds specified in ss 11–13, on the basis of which a marriage may be dissolved. Therefore, a decree for invalidation of a marriage can only be passed on the grounds set forth in the above sections. The provisions of s 5(iii) cannot constitute grounds for a divorce *de hors* the legislative intent.⁷¹

As mentioned, a marriage solemnised in violation of age requirement may not be strictly void or voidable. If one of the parties seeks a declaration that the marriage was a nullity on the ground of minority of the other spouse, the court must consider the nature of the dispute and then endeavour to adjudicate the matter.⁷²

CLAUSE (IV): DEGREES OF PROHIBITED RELATIONSHIP

This clause enacts that no marriage is valid if it is made between persons related to each other within the prohibited degrees, unless such marriage is sanctioned by the custom or usage governing both the parties. The custom which permits of a marriage⁷³ between persons who are within the degrees of prohibited relationship must fulfil the requirements of a valid custom; now

70 Quoted with approval in *Gindan v Barelal* AIR 1976 MP 83, 85; *Mohinder Kaur v Major Singh* AIR 1972 P&H 184; *Durjyodhan v Bengabati Dei* AIR 1977 Ori 36; *Budhi Sahu v Zoburani* (1970) ILR Cuttak 1215; *Naumi v Narotam* AIR 1963 HP 15; *P Venkataramana v State* AIR 1977 AP 43 (FB); *Ma Hari v Director of Consolidation* (1969) All LJ 623; *Premi v Doya* AIR 1965 HP 15; *contra—Kishni Devi v Tulsan Devi* AIR 1972 P&H 305; see also s 13(2)(iv); *Gajara Naran Bhura v Kanti* AIR 1997 Guj 185.

71 *V Mallikarjunatah v HC Gowramma* AIR 1997 Kant 77.

72 *Tanima v Pradeep* AIR 1992 Ori 178; *Salam v Sant Singh* AIR 1990 Cal 315 (Special Marriage Act 1954. If the marriage is not valid, an attempt at conciliation cannot be made—the marriage being void *ab initio*).

73 *Shakuntala Devi v Amar Nath* AIR 1982 P&H 221.

given statutory sanction by s 3(a) which defines the expressions 'custom' and 'usage'. The custom must not be unreasonable or opposed to public policy. No custom would be recognised if it is abhorrent to decency and morality or inconsistent with the practices of good men.⁷⁴ The rules relating to 'degrees of prohibited relationship' are prescribed in the definition clause [s 3(g)] and have been discussed under that clause. They are based on the principle of exogamy.

It will be noticed that the Act deals separately with the questions of prohibited degrees of relationship and *sapinda* relationship, though in some cases, both the prohibitions may overlap. The Hindu Marriage Disabilities Removal Act 1946, provided that notwithstanding any text, rule or interpretation of Hindu law or any custom or usage, a marriage between Hindus, which was otherwise valid, would not be invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara*. Before that enactment came into force, it was held that a man could not marry a girl of the same *gotra* or *pravara*, the theory being that his father and the girl's father were both descendants of a common ancestor in the male line. Such marriages could only be valid if sanctioned by custom. Section 29(1) of the present Act re-enacts the above provision of the Hindu Marriage Disabilities Removal Act 1946, because the latter enactment is now repealed by s 30. The rules now enacted in this and the next clause simplify the position to a considerable extent.

CLAUSE (V): SAPINDA RELATIONSHIP

This clause enacts that no marriage is valid if it is made between parties who are related to each other as *sapindas*, unless such marriage is sanctioned by usage or custom governing both the parties. The custom which permits of a marriage between persons who are *sapindas* of each other must fulfil the requirements of a valid custom now given statutory sanction by cl (a) of s 3 which defines the expressions 'custom' and 'usage'. The custom must not be unreasonable or opposed to public policy. No custom would be recognised if it is abhorrent to decency and morality or inconsistent with the practices of good men (see *Balusami v Balakrishna* supra).

The rules relating to '*sapinda* relationship' are prescribed in the definition clause [s 3(f)] and have been discussed in some detail under the clause. Reference may be made to the diagrams and illustrations.

CLAUSE (VI): CONSENT OF GUARDIAN OF MINOR BRIDE

This clause was deleted by the Child Marriage Restraint (Amendment) Act 1978, Act 2 of 1978. Under the original clause where the bride had not

⁷⁴ *Balusami v Balakrishna* AIR 1957 Mah 97.

completed the age of 18, it was necessary that the guardian in marriage should give his consent to the marriage. Reference may be made to 'Amendments'. (Also see s 12(1)(c) and notes thereunder.)

Section 6 of the Act gave a list of persons entitled to give consent as guardians in marriage. That section is now deleted by Act 2 of 1978.

The validity of a marriage depends upon the conditions stipulated in the section. In this connection, the Supreme Court, while examining the wider issues of reservation in the context of secularism as envisaged in the preamble to the Constitution, held that for a marriage to be valid, recognition by the parents of the bride or the groom or by the community is not a precondition for such recognition.⁷⁵ These observations of the court have to be read and interpreted in conjunction with the observations made by the Supreme Court and also by various other courts, time and again, that legislative intent cannot be added to or altered and what has not been stipulated by the legislature cannot be imputed in the section. If analysed in this context, it becomes clear that the legislature intended that marriages would be valid on the stipulations in the section being fulfilled. Recognition by family or community not being a ground stipulated in the section, the same cannot form the basis for validation.

6. Guardianship in marriage.—Repealed by the Child Marriage Restraint (Amendment) Act 1978 (2 of 1978).

Reference may be made to 'Amendments' under s 5.

AMENDMENT

Section 6, which is now deleted, was as under:

6. Guardianship in marriage—(1) Wherever the consent of a guardian in marriage is necessary for the bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:

- (i) the father;
- (ii) the mother;
- (iii) the paternal grandfather;
- (iv) the paternal grandmother;
- (v) the brother by full blood; as between brothers the elder being preferred;
- (vi) the brother by half blood; as between brothers by half blood the elder being preferred: Provided that the bride is living with him and is being brought up by him;

⁷⁵ *Valsamma Paul v Cochin University* AIR 1996 SC 1011.

- (vii) the paternal uncle by full blood; as between paternal uncles the elder being preferred;
- (viii) the paternal uncle by half blood; as between paternal uncles by half blood the elder being preferred;
Provided that the bride is living with him and is being brought up by him;
- (ix) the maternal grandfather;
- (x) the maternal grandmother; /
- (xi) the maternal uncle by full blood; as between maternal uncles the elder being preferred;
Provided that the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person as is referred to in sub-s (1), the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the court thinks it necessary to do so.

GUARDIANSHIP IN MARRIAGE

Section 5(iii) of the Act, before its amendment by Child Marriage Restraint (Amendment) Act 2 of 1978, laid down that the bride should have completed the age of 15 years at the time of marriage. That clause also laid down that where the bride has not completed the age of 18 years, the consent of her guardian in marriage, if any, should be obtained for the marriage (cl (vi)). As already pointed out, the true legal concept of a marriage under the Act is not one of contract and the scheme of the Act, despite these two conditions, is not to render void or even voidable, any marriage duly solemnised and otherwise valid, simply on the ground that it was in contravention of any of them. The Act did not insist upon free consent of the parties or of the guardian of a minor bride as a condition precedent to the validity of the marriage.

Violations of the conditions relating to the age of the parties and consent of the guardian in marriage where the bride had not completed the age of 18 years at the time of marriage, although they did not affect the validity of the ceremonial marriage under the Act, were made punishable under cl (a) and (c) of s 18 of the Act.

PERSONS WHO MAY ACT AS GUARDIANS IN MARRIAGE

The *smritikars* and the commentators prescribed rules for guardianship in marriage. The section substantially codified the previous law relating to persons who may act as guardians in marriage, but the mother was given a higher place immediately after the father, and the paternal grandmother and some maternal relations were recognised for the purpose. The list was rather long but had the merit of being exhaustive.

MARRIAGE WITHOUT CONSENT OF GUARDIAN

Sub-section (1) specified the order in which the persons enumerated were entitled to give the necessary consent. The primary duty, and correlative right of giving such consent, rested with the father. However, guardianship for the purpose of marriage is not so much a right as a duty and the consent of the guardian, as already pointed out, was not a condition precedent to the validity of the marriage. A marriage duly solemnised and otherwise valid under the Act was not rendered invalid nor voidable because it was brought about without the consent of the guardian in marriage or by a person not entitled to act as a guardian because there was a preferential guardian.

Sub-section (5) recognised jurisdiction of the court to prohibit by injunction and intended marriage of a bride below the age of 18 years if in the interest of the minor bride it thought it necessary to do so. It is perfectly consonant with the precepts of Hindu law, relating to the rights and duties of guardians in marriage and the doctrine of a general supreme guardianship of the state in case of minors, that the court should exercise a wide discretion in the matter, even though it does not strictly relate to the property or person of the minor.

7. Ceremonies for a Hindu marriage.—(1) A Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

CEREMONIES FOR A HINDU MARRIAGE

A Hindu marriage under the Act must be solemnised in accordance with the customary rites and ceremonies of at least one of the two parties thereto and must fulfil the conditions prescribed for the same by s 5 of the Act. The

word 'solemnise' means, in this connection, to celebrate the marriage with proper ceremonies and in due form. Unless the marriage is celebrated or performed with proper ceremonies and in due form, it cannot be said to be 'solemnised'. Merely going through certain ceremonies with the intention that the parties are taken to be married, will not make them ceremonies prescribed by law or approved by any established custom.⁷⁶

When essential ceremonies constituting a Hindu marriage are not proved, the mere issuance of a certificate under s 15 of the Special Marriage Act 1954 cannot validate the marriage if one of the parties is not a Hindu and the marriage has not been solemnised as per the requirements of this Act.

The Act does not, however, prescribe the ceremonies requisite for solemnisation of the marriage but leaves it to the parties to choose a form of ceremonial marriage which is in accordance with any custom or usage applicable to either party; and where the form adopted includes the *saptapadi*—that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire (*homam*)—the marriage becomes complete when the seventh step is taken. The Supreme Court, taking note of the ceremony of *saptapadi* has held that when the seven rounds are taken around the sacred fire, they cannot be short of seven steps.⁷⁷ This is in accordance with existing law. This rule relating to the essential ceremonies of a Hindu marriage proceeds on the principle that marriage being one of the *sanskaras* for a Hindu male or female, whether belonging to the twice-born castes or a *shudra*, must be performed with the necessary religious rites and at the same time, recognises the position that the customary rites and ceremonies vary in different parts of the country and also among different castes and communities.

The essential rites which may, however, be said to be the requirement common in all ceremonial marriages are:

- (i) invocation before the sacred fire; and
- (ii) *saptapadi*.

It will be seen that though the section emphasises the importance of the *saptapadi*, it does not insist upon the same because even under the previous law, the rule was that a marriage may be complete by the performance of ceremonies other than those referred to above, where it was allowed by the

⁷⁶ *Bhaurao v State of Maharashtra* AIR 1965 SC 1564; *Priya Bala v Suresh Chandra* AIR 1971 SC 1153; *Bibba v Ram Kali* AIR 1982 All 248; *Garja Singh v Surjit Kaur* AIR 1991 Punj 177 (solemnisation by distribution of gur and sugar, not sufficient proof for claiming share in estate of deceased); *Khiteshwar v Sowala* AIR 1991 Gau 61 (absence of proper pleadings and requisite evidence—no inference on solemnisation of marriage can be drawn); *Surjit Kaur v Garja Singh* AIR 1994 SC 135 affirming *Garja Singh*.

⁷⁷ *Vishnu Prakash v Sheela Devi* (2001) 4 SCC 729.

custom of the caste to which the parties belonged. *Kanyadaan* is an essential ceremony. Its absence, however, may not invalidate a marriage.⁷⁸

It is competent now for any two persons who are Hindus (as defined in s 2), to solemnise a ceremonial marriage under the Act and all that is insisted upon for the purpose of solemnisation of the marriage is that it must be in accordance with the customary rites and ceremonies of either party to the marriage. Persons belonging to different communities and different castes of Hindus have, in some places in India, different views respecting ceremonial observances and a different estimate of what are generally regarded as the essential rites and ceremonies which must accompany the performance of marriage. It is both just and reasonable, therefore, that the question of the requisite ceremonies must be adjusted in accordance with the custom and usage followed by them or either of them. Members of scheduled castes in Maharashtra converted to Buddhism are Hindus according to s 2 and the customary form of marriage adopted by them results in a valid marriage.⁷⁹ If there is an assertion about certain ceremonies having been performed, and if appeared on proof that the ceremony had not been undergone, the marriage would not be valid in law.⁸⁰

As custom is 'transcendent law' and expressly recognised by this section in the matter of performance of the marriage ceremonies, it is open to any party called upon to establish validity of a Hindu marriage to show that the customary rites and ceremonies of one of the spouses had been performed. The custom must, of course, be a valid custom. Whether it is a caste custom or a custom of any sub-caste or custom of a particular locality or a family, it must be ancient, certain and reasonable and not opposed to public policy.⁸¹ It cannot be enlarged beyond the usage of parity of reasoning since it is the usage that makes the law and not the reason of the thing.

PRESUMPTION AS TO MARRIAGE AND LEGITIMACY

There is an extremely strong presumption in favour of the validity of a marriage and the legitimacy of its offspring if from the time of the alleged marriage the parties are recognised by all persons concerned as man and wife and are so described in important documents and on important occasions.

78 *Ramlal Agarwal v Shantadevi* AIR 1999 AP 251.

79 *Sanjay v Eveline Jobe* AIR 1993 MP 54; *Baby v Jayant* AIR 1981 Bom 283.

80 *Shanti Dev Berma v Kanchan Prawa Devi* AIR 1991 SC 816 (assertion of *saptapadi*—not proved); *Joyita Saha v Rajesh Kumar Pandey* AIR 2000 Cal 109 (ceremonies not proved, certificate under Special Marriage Act—held not conclusive); *Devi Sharma v Chander Mohan* AIR 2003 P&H 327 (unconsciousness during ceremony, thereafter cohabitation for one year—no decree).

81 See definition of 'custom' and 'usage' in s 3(a); *Rabindra Nath v State* AIR 1969 Cal 55; *Rajdei v Lautan* AIR 1980 All 109 (a caste custom may not require *saptapadi* as a necessary ceremony—caste *biradari*).

The like presumption applies to the question whether the formal requisites of a valid marriage ceremony were satisfied.⁸² Similarly, the fact that a woman was living under the protection of a man, who generally lived with her and acknowledged her children, raises a strong presumption that she is the wife of that man. However, this presumption may be rebutted by proof of facts showing that no marriage could have taken place.⁸³ The formalities and customs of a valid marriage are also presumed to have been performed if a presumption of marriage arises on long period of cohabitation.⁸⁴ A plea that the marriage was prohibited by an act of the legislature must also be proved by the person alleging as such. (Refer *Packai Raj's* case).

FACTUM VALET

The doctrine of '*factum valet*' enables to cure the violation of a directory provision or a mere matter of form, but does not cure the violation of the fundamental principles or the essence of the transaction. If there are certain essential ceremonies, which are necessary for a marriage, the non-observance of those ceremonies or religious rites cannot be overlooked by applying the doctrine of *factum valet*. The doctrine applies only where there is no initial want of authority or where there is no positive interdiction. If certain essential rites are necessary for valid marriage, unless it is shown by custom that those ceremonies have been modified, it is imperative upon the parties concerned to observe the formalities laid down by law. There are, however, many ceremonies connected with the marriage, which are more or less non-obligatory or directory. If those ceremonies are not performed at the marriage, the omission may be cured by the doctrine of '*factum valet*'.

MADRAS ACT 21 OF 1967

This Act relates to validation of certain marriages known as *suyamariyathai* or *seerthiruththa*.⁸⁵

Section 7A of the Madras Act applies to marriages between Hindus only. If one of the parties is not a Hindu and subsequently, divorce proceedings are instituted under s 10 of the India Divorce Act 1954, such proceedings cannot endure as the marriage in question cannot be brought within the purview of the Special Marriage Act 1954.⁸⁶

82 See § 438 *ante*; *Guru Charan v Adikanda Behari* AIR 1972 Ori 38.

83 See § 438 *ante*; *Balasubramaniam v Suruttayan* AIR 1992 SC 756 (cohabitation leads to presumption that persons are living together as husband and wife), *Neelawwa Tarapur v Dirn Controller KSRTC* AIR 2002 Kant 347 (presumption from long co-habitation)

84 *Nirmala v Rukminibai* AIR 1994 Kant 247 (case law discussed).

85 *Raghuvir Kumar v Shanmughavadinu* AIR 1970 Mah 330.

86 *Packai Raj v Subhammal* AIR 1991 Mad 319.

If a subsequent marriage, during the pendency of the first marriage is entered into by observing the ceremonies under the Tamil Nadu Amendment, it would be a bigamous marriage and would be liable to be punished under s 494 of the Indian Penal Code.⁸⁷

8. Registration of Hindu marriages.—(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

REGISTRATION OF MARRIAGE

Under the Indian law, it is open to two Hindus if they so desire it to contract civil marriage and have it solemnised under the Special Marriage Act 1954. The provisions, relating to the solemnisation and registration of a civil marriage are laid down in that Act. Chapter III of that enactment lays down provisions relating also to registration of marriage celebrated in other forms. It is open to two Hindus married according to the ceremonial form to have their marriage registered under that Chapter, provided they fulfil the conditions therein laid down. Two Hindus, therefore, whose marriage is solemnised in

⁸⁷ *S Nagalingam v Sivagani* AIR 2001 SC 3576.

accordance with the provisions of the present enactment, can get their marriage registered under that chapter. The effect of such registration is stated in s 18 of that enactment.

The section enacts that the state government may make rules relating to the registration of marriages between two Hindus solemnised in the ceremonial form. The obvious and immeasurable advantage of registration is that it facilitates proof of the factum of marriage in disputed cases. The Act does not lay down any rules relating to registration but merely empowers the state government to make rules providing for registration of Hindu marriages. It also empowers the state government in its discretion to provide that such registration shall be compulsory. The rules so framed must not in any manner be contrary to any provision of the Act and if they contravene any such provision, they would be ultra vires and of no binding effect.

The rules can provide that the parties to any Hindu marriage may, and where registration is made compulsory, shall have the requisite particulars relating to their marriage entered into in Register of Marriages. Sub-section (1) speaks of the 'parties to the marriages' and sub-s (2) speaks of 'any person' contravening any rule made on behalf and, although the language is not too clear, it would seem that the duty of giving particulars relating to the marriage may be casted on persons other than the parties, for instance, the parents of the parties or the priest who officiates at the marriage ceremonies.

The Register of Marriages is to be open for inspection by any member of the public and entries made in it are admissible as evidence. A certificate of marriage is no proof of validity if the marriage is otherwise void, it can however be proof of identity of parentage of offspring of such marriage.⁸⁸

CONSEQUENCES OF NON-REGISTRATION AND PENALTY FOR FAILURE TO REGISTER

Registration of Hindu marriages under the Act is only for the purposes of preserving a record of the same and facilitating their proof. Omission to do so does not, even when registration is made compulsory by the state, affect in any manner the validity of the marriage, but will invite the penalty of a fine, which may extend to 25 rupees. Furnishing false information by any person legally bound to give information to any public servant or to any subject with knowledge or having reason to believe that it is false is punishable as an offence under s 177 of Indian Penal Code 1860.

⁸⁸ *Kangavalli v Saroja* AIR 2002 Mad 73.

GRANT OF COPIES

Sub-section (4) gives an unrestricted right to any member of the public to obtain a certified copy of an entry in the register on payment of the prescribed fee.

CHAPTER III

RESTITUTION OF CONJUGAL RIGHTS AND JUDICIAL SEPARATION

9. Restitution of conjugal rights.—When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation—Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

AMENDMENT

This section was amended by the Marriage Laws (Amendment) Act 68 of 1976. The explanation was added and sub-s (2) was omitted. Sub-section (2) stated 'Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce'. See notes under 'Repealed sub-s (2)'.

RESTITUTION OF CONJUGAL RIGHTS

Even apart from legislation relating to matrimonial law, decrees for restitution of conjugal rights have been passed by courts in India in case of all communities, though at one time it was questioned whether they had jurisdiction to entertain cases of this description.⁸⁹ The concept of the existence

89 *Dadaji Bhikaji v Rukmabai* (1886) 10 Bom 310; *Moonshe Buzloor Ruheem v Shumsoonissa Begum* (1867) 11 MIA 551; *Tekait Mon Mohini v Basanta Kumar* (1901) 28 Cal 751; *Bai Jivi v Narsingh Lalbhai* (1926) 51 Bom 329. Also see § (Vol 1) 444.

of the court's power to give this relief was borrowed from English law. Matrimonial causes in England were formerly heard and determined by ecclesiastical courts and the earlier English statutes which gave jurisdiction to the King's Courts directed the courts to determine causes as far as possible on the principles of ecclesiastical law. The legislature did not alter the canon law except in a few matters and the judges who administered the law were bound by precedents established in the ecclesiastical courts. An examination of the decisions of courts in India in matters of restitution of conjugal rights shows that in some respects the general principles underlying the English law was described as barbarous by Lord Herschell,⁹⁰ but there have since been considerable changes effected in that law and the provisions of the recent legislation have the effect of abolishing the remedy.⁹¹

The Supreme Court has held that this section is not violative of arts 14 and 21 of the Constitution.⁹²

BASIS OF THE RULE AND IMPORTANCE OF A DECREE FOR RESTITUTION

The foundation of the right to bring a suit for restitution of conjugal rights is the fundamental rule of matrimonial law that one spouse is entitled to the society and comfort—*consortium*—of the other spouse and where either spouse has abandoned or withdrawn from the society of the other without reasonable excuse or just cause, the court should grant a decree for restitution.

The importance of the relief by way of a decree for restitution of conjugal rights recognised in this section lies in this that it enables the aggrieved spouse to apply to the court for maintenance under s 25; and maintenance pendente lite may also be claimed by making out a case for the same as provided in s 24. This enables a wife, who does not desire disruption of the marriage or even judicial separation from the husband, to secure provision for her support by an order of the court under the matrimonial jurisdiction conferred on it, instead of filing a suit for maintenance under the law relating to maintenance now embodied in the Hindu Adoptions and Maintenance Act 1956.⁹³

The more practical importance, however, of this relief by way of a decree for restitution of conjugal rights is that it affords a ground for divorce to either party under s 13(1A) which lays down that either party to a marriage, whether solemnised before or after the commencement of the

⁹⁰ *Russell v Russell* [1897] AC 395, 455.

⁹¹ Matrimonial Proceedings and Property Act 1970, s 20. The position is the same after Matrimonial Causes Act 1973.

⁹² *Saroj Rani v Sudarshan Kumar* AIR 1984 SC 1562, overruling *Sareeta v Venkatasubiah* AIR 1983 AP 356, *Harinder Kaur v Harmandar Singh* AIR 1984 Del 66.

⁹³ See notes under s 24

Act, may obtain a decree of divorce on the ground that there has been no restitution of conjugal rights between them for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

In a petition for restitution of conjugal rights, under this section, a petitioner can pray for alternative relief by way of divorce.⁹⁴

PETITION TO THE DISTRICT COURT

The petition for restitution of conjugal rights must be made to the 'district court' as defined in s 3(b). Reference may be made to notes under s 19, *post*. Where a suit is filed instead of a petition, the decision is not a nullity, the difference being one merely of nomenclature.⁹⁵

RESTITUTION WHEN DECREED AND WHEN REFUSED

This section must be read with s 23 of the Act which imposes on the court the duty to inquire into and pass a decree, *inter alia*, for restitution of conjugal rights, after satisfying itself about certain matters, the petitioner must show that there is a bona fide desire to resume matrimonial cohabitation and to render the rights and duties of matrimonial life. The petitioner who is sincere in that sense can seek the relief but not otherwise.⁹⁶ The decree may be passed on a petition by either spouse who may be the aggrieved party. Thus, a wife, compelled to leave the matrimonial home because of ill treatment is entitled to a decree of restitution when the husband did not make any efforts to take her back.⁹⁷ Before passing a decree for restitution, the court must be satisfied beyond reasonable doubt that the respondent has, without reasonable excuse, withdrawn from the society of the petitioner; and there is no legal ground why the decree should not be passed. Failure of an earlier petition for grant of divorce on the grounds of desertion will disentitle a subsequent petition for restitution of conjugal rights⁹⁸

The legal grounds for refusing to grant relief may consist of:

- (i) for instance, any ground on which the respondent could have asked for a decree for judicial separation or for nullity of marriage or for divorce;

⁹⁴ *Krishna Devi v Addl Civil Judge* AIR 1985 All 131.

⁹⁵ *Sivanandi v Bhagavathyamma* AIR 1964 Mah 237; *Kusum Lata v Kamta Prasad* AIR 1965 All 280.

⁹⁶ *Sayal v Syal* AIR 1968 P&H 489; *Jogindra Kaur v Shivcharan Singh* AIR 1965 J&K 95.

⁹⁷ *Pradeep Kumar v Dalimla* AIR 2003 Ori 79.

⁹⁸ *Karabi Das (Smt) v Paritosh Das* AIR 2003 Cal 61.

- (ii) reasonable excuse (or what is spoken of in this context as just cause) for withdrawing from the society of the petitioners;
- (iii) any conduct on the part of the petitioner or fact tantamount to the petitioner taking advantage of his or her own wrong or any disability for the purpose of such relief [s 23(1)(a)];
- (iv) collusion with the respondent [s 23(1)(c)];
- (v) unnecessary or improper delay in instituting the proceeding [s 23(1)(d)];
- (vi) grounds which are available to a wife to claim maintenance under s 18 of the Hindu Adoptions and Maintenance Act 1956.⁹⁹

Reference may also be made to notes under s 23(2) 'Reconciliation'.

- (i) A wife can resist a petition for restitution of conjugal rights on the ground that the husband had married another wife before the Act came into operation and by bringing her case within the ambit of s 13(2)(i) *post*.¹
- (ii) Restitution of conjugal rights cannot be refused to a husband on the ground of a custom forfeiting the right of outcasted husband to the society of wife.²
- (iii) The court may refuse to grant a decree of restitution of conjugal rights to petitioner on the ground that the marriage of the parties was in violation of the Child Marriage Restraint Act 1929. The position, however, can be different if after attaining full age, the wife had lived with the husband and had withdrawn from his society without reasonable cause.³

A husband has the right to require his wife to live with him wherever he may choose to reside and special circumstances apart, the court will not absolve the wife from discharging her corresponding duty and the court is satisfied that the attitude of the wife does not furnish any reasonable excuse or just cause for living apart.⁴ Even an agreement between the parties, prior to the marriage, that the spouses will live in the house of the wife's father, will not affect the husband's right. Such an agreement per se would be no answer to a husband's petition for restitution of conjugal rights.⁵

99 *N Satyanarayana v M Veramuni* AIR 1918 AP 123.

1 *Veeriah v Nagiah* AIR 1959 AP 547 (FB); *Venkatamma v Venkataswamy Reddy* AIR 1963 Mys 118; *Deepo v Kehar Singh* AIR 1962 Punj 183; *Mallappa v Neelawwa* AIR 1970 Mys 59.

2 *Mohan Lal v Shanti Devi* AIR 1964 All 21 (also see s 4(a) of the Act).

3 *Sukram v Mishri Bai* AIR 1979 MP 144.

4 *Tirath Kaur v Kirpal Singh* AIR 1964 Punj 28 (wife not willing to give up her job and join husband); *Gaya Prasad v Bhagwati* AIR 1966 MP 212 (attitude of the wife was most unreasonable); *Surinder Kaur v Gurdeep Singh* AIR 1973 P&H 134; *PVP Sarma v Sesbalakshmi* AIR 1975 AP 239; *K Kanthimathi v SP Iyer* AIR 1974 Ker 124.

5 *Pothu Raju v Rodha* AIR 1965 AP 407.

The position, of course, would be different if circumstances compel the spouses to live in different places and furnish a reasonable excuse or just cause to the wife to live in a different place. The court will not be guided in such cases by any rigid or old concepts of marital duties and will prefer to take into account, present-day conditions.⁶

As to the choice of matrimonial home, reference may be made to the observations in the undermentioned case.⁷

BURDEN OF PROOF

The initial onus of proving that the respondent, has without reasonable excuse, withdrawn from the society of the petitioner, must obviously rest on the petitioner. The mere circumstance that the wife's allegation of cruelty in defence in any such case is not proved, would not displace that onus.⁸ However, the onus of proving reasonable excuse must rest on the respondent.⁹ The initial burden being on the petitioner, the petitioner must, as a rule, lead evidence to establish the averments on which relief is sought.¹⁰

'REASONABLE EXCUSE' OR 'JUST CAUSE'

The question whether conduct falling short of cruelty or any other matrimonial offence can justify one spouse in leaving another has been much debated in England and judicial opinion on the question is not wholly uniform.¹¹ However, the more recent and acceptable view seems to be that the 'just cause' must be 'grave and weighty' or as it is sometimes said, 'grave and convincing' and that it may be distinct from a matrimonial offence. It may be distinct from cruelty to the extent that it falls short of or is less than legal cruelty but nonetheless, the reasons for withdrawal from the society of the petitioner must be grave and weighty. In *Timmins v Timmins*,¹² it was held

6 *Shanti Nigam v Ramesh Chandra* (1971) ALJ 67; *Mirchumal v Devi Bai* AIR 1977 Raj 113; *Pravina Ben v ST Arya* AIR 1975 Guj 69; *NR Radhakrishnan v N Dhanalakshmi* AIR 1975 Mah 330 (also conduct of husband).

7 *Swaraj Garg v KM Garg* AIR 1978 Del 296.

8 *Rebarani v Ashit* AIR 1955 Cal 162; *Kanchan Gauri v Chandulal* AIR 1973 Guj 275.

9 *Hardeep Singh v Dalip Kaur* AIR 1970 P&H; *Pushpa Rani v Vijay Pal Singh* AIR 1994 All 216, 284 (cruelty can be a defence in an action for restitution, but it must be proved. Facts of the case not proved, hence restitution decreed.); *Manjula v Zaverilal* AIR 1975 Guj 275; *Atmaram v Narbada Devi* AIR 1980 Raj 35.

10 *Ratnaprabhabai v Sheshrao* AIR 1972 Bom 182; *Sushila Bai v Prem Narain* AIR 1986 MP 225 (burden of proof is light); *Jyothi Pai v Pratap Kumar Pai* AIR 1987 Kant 24.

11 *Edwards v Edwards* [1949] 2 All ER 145 and *Pike v Pike* [1953] 1 All ER 232, *Dixon v Dixon* [1953] 1 All ER 910.

12 [1953] 2 All ER 187.

by the Court of Appeal that the husband was not guilty of cruelty but his conduct was a grave and weighty matter which gave the wife good cause for leaving him and prevented him from obtaining a decree for restitution of conjugal rights, unless and until he satisfied the court that, if she returned to him, he would behave with conjugal kindness, and, therefore, was a defence to the husband's petition for restitution.

The court should, while assessing as to whether there was reasonable excuse or just cause on the part of the spouse alleged to have left the matrimonial home, take note of the pleadings, since the defence of the spouse who is alleged to have left the matrimonial home as regards the reason for doing so would assume significance in the attendant facts and circumstances. When a defence of mental pain or physical acts on the part of the other spouse are taken up in order to justify the reason for leaving the matrimonial home, the court should weigh the circumstances in order to arrive at a conclusion. The court cannot ignore the defences in an action for restitution and insist on the respondent proving the defences set up in order to defeat the action. The concept of 'reasonable excuse' or 'just cause' assumes significance since, as mentioned earlier, the conduct of the spouse seeking restitution may fall short of cruelty in the legal sense, but may be such that it may justify withdrawal from society by the respondent.¹³ The court's refusal to pass a decree of restitution of conjugal rights is within its discretion if there is evidence of ill treatment, upto the time that such apprehension abates.¹⁴

Since it is apparent that this section envisages just cause for the respondent to leave the matrimonial home for reasons that may be 'grave and convincing', it may be stated that the degree of proof which is required to justify the respondent's action in leaving the matrimonial home can be stated to be on a much lower plinth than conduct which falls within the ambit of s 13, justifying action under that section.

Repealed sub-s (2)

The language of sub-s (2) which is now omitted by the Amending Act of 1976, gave the impression that the reasonable excuse envisaged in sub-s (1) must be such conduct on the part of the petitioner-spouse as would actually amount to a matrimonial offence.

It would seem that conduct of a spouse which for one reason or another falls short of cruelty or any other matrimonial offence, would afford reasonable excuse for leaving or withdrawing from the society of the spouse and be a defence to a suit for restitution under the present section. Whether one party has reasonable excuse for leaving the other or staying apart, must depend on whether the conduct complained of is of a grave and weighty character. The plea that there was reasonable excuse for the respondent to

¹³ *S Jayakumari v S Krishnan Nair* AIR 1995 Ker 139.

¹⁴ *Promod Naik v Sukanti Naik* AIR 2004 Ori 72.

withdraw from the society of the petitioner, must in substance involve an inquiry into facts. Each case must depend on its own facts and circumstances and it is not possible to give an exhaustive statement of what may or may not constitute 'reasonable excuse'. In the decisions mentioned below,¹⁵ the above principles were accepted and relief under the present section was not granted to the petitioner on the ground that the other spouse had withdrawn from the society of the petitioner for a reasonable excuse. A contrary view has been expressed by the High Courts of Andhra Pradesh and Mysore¹⁶ which have held that the 'reasonable excuse contemplated by sub-s (i) must be one which would afford a ground either for judicial separation or for nullity of marriage, or for divorce'.

Sub-section (2) was omitted to remove the uncertainty. Reference may also be made to the undermentioned decisions as to what amounts to withdrawal from society within the ambit of the *Explanation*.

CORRESPONDENCE

Correspondence between the spouses is quite often relied upon in support of or in opposing the plea for restitution of conjugal rights. These letters have to be read bearing in mind the circumstances, the anxiety and mental condition of the spouses at the time and also the situation and the thoughts of the parties which occasioned the statements, complaints and at times, even allegations therein contained.¹⁷ Such correspondence between spouses may assume significance in view of assertions that may have been made, and the court can order that such correspondence be produced before it, in order to examine the veracity of the allegations contained in such correspondence.¹⁸

15 *Tulsa v Pannalal* AIR 1963 MP 5; *Gurdev Kaur v Sarwan Singh* AIR 1959 Punj 162; *Mango v Prem Chand* AIR 1962 All 447; *Rabindranath v Pramila Bala* AIR 1979 Ori 85 (habitual nagging of wife and treatment amounting to mental torture inflicted by parents-in-law); *Bejoy v Aloka* AIR 1969 Cal 477; *Sadhu Singh v Jagdish Kaur* AIR 1969 P&H 139; *P Radhakrishna Muthy v Vijayalakshmi* AIR 1983 AP 380 (ill-treatment); *Anna Sabeel v Tarabai* AIR 1970 MP 36; *Madan Mohan v Sarla Kobli* AIR 1967 Punj 397 (baseless allegations of unchastity); *Kanna v Krishnaswami* AIR 1972 Mah 247; *Shanti Devi v Balbir Singh* AIR 1971 Del 294; *Jagadish Lal v Shyama* AIR 1966 All 150 (husband's inability to consummate marriage); *Karnail Singh v Bhupinder Kaur* AIR 1973 P&H 19; *Satya Devi v Ajai Singh* AIR 1973 Raj 20; *Sumanbai v Anandrao* AIR 1976 Bom 212; *Jaishree v Mohan* AIR 1987 Bom 220 (unfounded allegation of adultery in written statement); *Rabindranath v Pramila Bala* AIR 1979 Ori 85; *Pramilabala v Rabindranath* AIR 1977 Ori 132; *Ramarao v PR Krishnamani* AIR 1973 Mah 279; *K Kanthimathi v SP Iyer* AIR 1974 Ker 124; *Chand Narain v Saroj* AIR 1975 Raj 88; *Shanti Devi v Balbir Singh* AIR 1971 Del 294; *Kamaladevi v Shivakumaraswami* AIR 2003 Kant 36 (no restitution when husband treated spouse with cruelty and she had to leave the matrimonial home).

16 *Annapurnamma v Appa Rao* AIR 1963 AP 312; *Revanna v Susselamma* AIR 1967 Mys 165; *K Ramopi v K Kameswari* AIR 1975 AP 3.

17 *Manjula v Zaverilal* AIR 1975 Guj 158.

18 *Anvu Anandan v D Sivakumari* AIR 1999 Mad 232.

DELAY

Unnecessary and improper delay in instituting proceedings for restitution of conjugal rights can be a ground for refusing relief under this section.¹⁹ Reference may be made to s 23(1)(d) *post*.

SEPARATION BY MUTUAL CONSENT

Prior to the passing of the Matrimonial Causes Act 1884, it was regarded as settled law in England that deeds of separation were utterly inoperative to abrogate the duty of cohabitation involved in the tie of marriage and that, notwithstanding any such agreement, it was competent to either party to sue for a decree of restitution of conjugal rights.²⁰ Though an agreement between husband and wife to live apart is not by itself a bar to a petition for restitution of conjugal rights in England, the effect of the above Act which enacted that a respondent who failed to comply with a decree for restitution should be deemed guilty of desertion without reasonable cause, and that a suit for judicial separation might be instituted on that ground, was that the court was empowered to refuse a decree for restitution where such an agreement was shown to exist and neither party had taken steps to set it aside. It has also been held there that a valid agreement between the spouses to live apart may exist in the absence of a formal deed of separation and without an express covenant not to sue for restitution of conjugal rights.²¹ The principle underlying the cases on the subject is that an agreement providing for present separation is valid while on the other hand, an agreement for future separation is bad and opposed to public policy.

The defence that there was a pre-nuptial contract between the parties to live separate in certain circumstances was raised in some cases in India where restitution was sought and such contracts were held to be void and illegal as interfering with marital duties and opposed to public policy. Those decisions also turned on the principle that such agreements were contrary to the personal law of the parties. However, the fundamental difference between a case where an agreement for living separate entered into during the continuance of marriage and an agreement before or at the time of marriage controlling the rights of the parties is that the first was not disregarded and only agreements of the latter character were treated as nugatory and infructuous.²²

There seems no reason why a valid agreement for immediate and not

19 *Tera Singh v Sarjit Kaur* AIR 1962 Punj 195; *Shanti Devi v Ramesh Chandra* AIR 1969 Punj 27.

20 *Crabbe v Crabbe* (1968) 1 LR PD 601.

21 *Walter v Walter* [1921] P 302.

22 *Tekait Mon Mohini v Basant Kumar* (1901) 28 Cal 751; *Krishan Aiyar v Balammal* (1911) 34 Mad 398.

future separation, bona fide entered into, during the continuance of marriage with a view to enable the parties to live in peace should not be treated as empowering the court to refuse a decree for restitution. It is submitted that a different rule would have the effect of enabling a party to get a decree of divorce on the ground of non-compliance with the decree for restitution on facts contrary to the truth of the case. Moreover, a spouse who is living separate, after a bona fide agreement of this nature, cannot properly be said to have withdrawn from the society of the other spouse without reasonable excuse.²³

CONSENT DECREE

Reference may be made to notes under s 23 *post*.

MODE OF EXECUTION OF DECREE

The Code of Civil Procedure 1908, O 21, rr 32, and 33 deals with the question of execution of a decree for restitution of conjugal rights. There can be no sanction or procedure as compulsion by the court to force a party to a marriage to return to the other spouse against his or her will and the more modern procedure is as now laid down in the provisions mentioned above. Section 24 of this Act lays down rules relating to maintenance pendente lite and expenses of proceedings and s 25 lays down rules relating to orders for maintenance which can be made at the time of passing of the decree or at any time subsequent to such decree. Reference may also be made to s 28 and notes thereunder. The powers of the executing court are limited to attachment of property of the defaulter if the decree of restitution is not obeyed.²⁴

PENDING PROCEEDINGS ARE GOVERNED BY THE SECTION

It is submitted that suits for restitution of conjugal rights between Hindus whose marriage was solemnised in accordance with Hindu law, pending at the date of the commencement of this Act, will be within the ambit of this section. A different view has been expressed by the High Court of Punjab²⁵, but the only question for the determination of the court in that case related

23 A contrary view has been taken in *Thirumal v Rajammal* AIR 1968 Mah 201; however, see *Sandhya v Salil Chandra* AIR 1980 Cal 244 where the above proposition was accepted.

24 *Vijay Kumar v Neelam Ram* AIR 2004 Raj 256.

25 *Balwant Singh v Balwant Kaur* AIR 1957 Punj 1; *Sivanandy v Bhagavathyamma* AIR 1962 Mad 400; *Yankappa v Shanappa* AIR 1960 Mys 265; *Thenkuy Veeriah v Tamiseti Nagiah* AIR 1959 AP 547 (FB).

to jurisdiction and not to the applicability of the provisions contained in the present section. A suit for restitution of conjugal rights was pending in the court of the subordinate judge when the Act came into operation and it was contended that the district court alone had jurisdiction to proceed with the suit by operation of s 19 of the Act which deals with jurisdiction. The High Court negatived the contention. Section 19 applies only to petitions presented after the Act came into operation and there is no other provision in the Act which affects the jurisdiction of courts which were competent to try pending suits for restitution of conjugal rights.²⁶

10. Judicial Separation.—(1) Either party to a marriage, whether solemnised before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of s 13 and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

AMENDMENT

Before its amendment by the Marriage Laws (Amendment) Act 1976 (68 of 1976) sub-s (1) of the section was as under:

10. Judicial Separation—(1) Either party to a marriage, whether solemnised before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party—

- (a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- (b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or
- (c) has, for a period of not less than one year immediately preceding

²⁶ This was quoted with approval in *Udainath v Chhaya* AIR 1963 Ori 27; s 29(3); *Yankappa v Shavakka* AIR 1960 Mys 265.

- the presentation of the petition, been suffering from a virulent form of leprosy; or
- (d) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or
 - (e) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition; or
 - (f) has, after the solemnisation of the marriage, had sexual intercourse with any person other than his or her spouse.

Explanation—In this section, the expression ‘desertion’, with its grammatical variations and cognate expression, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

PENDING PETITIONS AND PROCEEDINGS

As to pending petitions and proceedings relating to s 10 including appeals, reference may be made to notes under s 13 where attention is drawn to s 39 of the Amending Act of 1976 and its effect on pending matters.

JUDICIAL SEPARATION

A legal or judicial separation permits the parties to a marriage to live apart. Sub-section (2) in terms states that where a decree for judicial separation has been passed, it shall no longer be obligatory for either party to cohabit with the other. The effect of the decree is that certain mutual rights and obligations arising from the marriage are suspended and the rights and duties prescribed by the decree are substituted therefore. The decree does not sever or dissolve the marriage tie, which continues to subsist. It affords an opportunity for reconciliation and adjustment. It may fall by a reconciliation of the parties in which case, the rights of respective parties, which flowed from the marriage and were suspended, are restored. Where there is no reconciliation and cohabitation is not resumed, it serves after one year of the passing of it as the basis for the dissolution of the marriage by a decree of divorce [s 3(1A)].²⁷ Although in a sense, the decree for judicial separation is provisional and conditional, the court cannot while passing the decree impose any terms on the parties as to the nature or duration of its operation.

²⁷ Quoted with approval in *Jethabbai v Manabai* AIR 1975 Bom 88, 100.

A petition for judicial separation cannot obviously lie if the marriage between the parties was void *ab initio*.²⁸

A spouse who is merely living apart without having obtained a decree for judicial separation cannot be said to be 'judicially separated'.²⁹

Attention has already been drawn in the introductory note to the distinction between a decree of judicial separation and one for divorce. This section lays down the grounds, which give either party to a marriage the right to present a petition for a decree of judicial separation. It will be noticed that the grounds are the same as specified in s 13. Desertion, cruelty and adultery are the principal matrimonial offences. The conduct of a spouse showing unwillingness to resume cohabitation would entitle the other spouse to a decree of separation; an intention to bring about an end to cohabitation being essential and present.³⁰ A spouse was held entitled to a decree of judicial separation when circumstances existed compelling her to flee the matrimonial home. The facts also showing that constructive desertion also stood proved.³¹ A spouse seeking judicial separation on grounds of his living away from the matrimonial home due to cruel treatment and indecent behaviour must prove such facts, failing which a decree cannot be passed.³²

The wronged spouse may not seek relief by way of dissolution of marriage and may, at least for the time being, be content with obtaining a decree for only judicial separation in the hope of adjustment or reconciliation. Of course, the aggrieved spouse can ask for relief by way of divorce later under s 13(1A)(i). Even though there is desertion proved on the facts, the court can still pass a decree of judicial separation if there is scope for revival of the matrimonial ties.³³

SUB-SECTION (1)

A petition for judicial separation may be presented to the court by either party to a marriage on the same facts as for divorce and on any of the grounds specified in s 13(1) and in case of a wife also on any of the grounds specified in s 13(2).

Adultery

See notes under s 13(1)(i).

Cruelty

See notes under s 13(1)(ia).

28 *Biswanath v Anjali* AIR 1975 Cal 45.

29 *Darshan Prasad v Civil Judge, Gorakhpur* AIR 1992 SC 967.

30 *Adhyatma Alwar v Sri Devi* AIR 2002 SC 88.

31 *Anubha v Vikas Aggrawal* AIR 2003 Del 175.

32 *Gopal Chandra Mallick v Manjari Mallick* AIR 2004 Jhar 104.

33 *Harjit Kaur v Roop Lal* AIR 2004 P&H 22.

Desertion

See notes under s 13(1)(ib).

‘Ceased to be a Hindu by conversion’

See notes under s 13(1)(ii).

Unsound Mind: Mental disorder

See notes under s 13(1)(iii).

Leprosy

See notes under s 13(1)(iv).

Venereal Disease

See notes under s 13(1)(v).

Adoption of Religious Order

See notes under s 13(1)(vi).

‘Not heard of...for seven years’

See notes under s 13(1)(vii).

‘...after decree for judicial separation’

See notes under s 13(1a)(i).

‘...after decree for restitution of conjugal rights’

See notes under s 13(1A)(ii).

Husband having more than one wife

See notes under s 13(2)(i).

Husband guilty of rape, sodomy or bestiality

See notes under s 13(2)(ii).

**AMENDED AND UNAMENDED PROVISIONS
RELATING TO JUDICIAL SEPARATION**

In notes under s 13, attention has been drawn to points of distinction between the amended and unamended provisions relating to judicial separation.

SUB-SECTION (2): RESCISSION OF DECREE

This sub-section confers on the court the power to rescind a decree for judicial separation, passed under this section, on application by either party if it considers it just and reasonable to do so. No difficulty can arise where the parties themselves are agreeable to rescission of the decree or where the application is not resisted. However, where the application is resisted, the extraordinary power would be exercised by the court in exceptional circumstances where there are compelling reasons.³⁴ Mere expression of willingness to go and live with the other spouse but one against whom the decree has gone, would not be sufficient.³⁵ In the ultimate analysis, the court would be guided by what it considers to be just and reasonable having regard to the totality of all the facts and circumstances of the case.

CONSENT DECREE

As regards consent decree attention is invited to notes under s 23 *infra*, and the decisions cited therein.

CHAPTER IV

NULLITY OF MARRIAGE AND DIVORCE

11. Void Marriages.—Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

Sections 11 and 17 (monogamy) do not offend art 15(1) of the Constitution.³⁶

MARRIAGE VOID *IPSO JURE*

Marriage under the Act is the voluntary union of one man with one woman to the exclusion of all others, satisfied by the solemnisation of the marriage. A marriage may be solemnised in the sense that the parties to it have gone through the customary rites and ceremonies of either party thereto as laid

³⁴ *Godabai v Narayan* AIR 1973 MP 4

³⁵ *S Narasimha v Vijayabai* AIR 1978 Kant 115.

³⁶ *Sambireddy v Jayamma* AIR 1972 AP 156 (FB).

down in s 7. However, such a marriage to be valid must in any event fulfil three of the conditions enacted in s 5. The three conditions are:

- (i) neither party has a spouse living at the time of the marriage [cl(i)];
- (ii) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
- (iii) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two [cl (v)].

The present section in terms lays down that non-fulfillment of any one of these conditions renders a marriage, solemnised after the commencement of the Act, null and void from its inception, and either party to such marriage can obtain decree of nullity from the court. Parties to a marriage solemnised before the Act came into force are not, however, affected by this rule. In respect of matters dealt with by this section, they are governed by the previous law. However, the prohibition imposed against bigamy is equally applicable to them, with the result that a Hindu husband cannot, after the Act came into force, marry another wife as long as his previous marriage is subsisting. If, however, customary divorce of an earlier marriage is pleaded, the existence of such a custom must be established.³⁷ The evidence proving the factum of customary divorce if provided, and such divorce having been obtained before the time when the subsequent marriage was entered into, it cannot be said that there was no valid divorce and that a fraud had been committed on the other spouse.³⁸

The three conditions, non-fulfillment of which, renders a marriage solemnised after the commencement of the Act, null and void, have been considered in some detail under ss 3(f), 3(g) and 5. Attention has been drawn in the Introduction to the scheme of the Act and the distinction between a marriage that is void *ipso jure* and a marriage which is voidable under s 12.

The section is applicable only to a marriage solemnised after the commencement of the Act. If, however, a second marriage has been contracted before the commencement of the Act, such a marriage though it may be void, cannot be a void marriage under this Act.³⁹

As regards the legitimacy of children born of a void marriage as stipulated under s 16 of the Act, see the notes under that section and the decision of the Supreme Court in *PEK Kalliani v K Devi*,⁴⁰ which overrules the decision of the Kerala High Court, which on an overall analysis has held that s 16

37 *Asba Rani v Gulshan Kumar* AIR 1995 P&H 287.

38 *Ramesh v Rajpati* AIR 2003 P&H 317.

39 *PEK Kalliani v K Devi* AIR 1996 SC 1963.

40 *Ibid.*

stands delinked from this section after the amendment of 1976. The court has also held that (in para 76 of the judgment) this section is limited only to those marriages contracted after the commencement of this Act and which are in violation of the stipulations contained in s 5 of this Act.

In a petition for nullity of marriage, on the ground that the respondent had a spouse living at the time of marriage [s 5(i)], it need not necessarily be established by direct evidence and positive proof that the spouse by an earlier marriage was in existence at the time of the performance of the marriage with the petitioner. It may be implied from other facts and circumstances which should, however, be cogent and reliable.⁴¹

DECLARATORY SUIT UNDER CIVIL PROCEDURE CODE

It may be noticed that this section relates to petition for declaration that the marriage of the petitioner with the respondent is a nullity and the petition has to be against the other party. Of course, there can be a civil suit by a person for declaration that the marriage of *A* with *B* was a nullity and for consequential reliefs under the Specific Relief Act 1963, if the plaintiff has any cause of action for such relief. Thus, for instance, a first wife may file a regular suit that the marriage of her husband with another woman is a nullity. She cannot file a petition under this section.⁴²

The phrase 'either party thereto' in the section means only the two actual parties to the marriage and no third party. However, there is nothing in the section or any other provision of any law to debar a person affected by an illegal marriage from filing a suit in a civil court for its declaration as void, if such party was affected by such marriage.⁴³

DECREE OF NULLITY

A decree of nullity may be passed by the court at the instance of either party to the marriage, solemnised after the commencement of the Act, on the ground that the marriage was in contravention of any of the three conditions mentioned in the section.⁴⁴ Either party to the subsequent marriage

⁴¹ *Rajula v Suka* AIR 1972 MP 57.

⁴² *Harmoban v Kamala Kumari* AIR 1979 Ori 51, *Sheel Wati v Ram Nandan* AIR 1981 All 42; *Rajesh Bai v Shanta Bai* AIR 1982 Bom 231. The validity of the marriage solemnised after the Act came into force would be decided by applying this section.

⁴³ *Ram Pyari v Dharam Das* AIR 1984 All 147 (case law discussed).

⁴⁴ A third party cannot apply under this section for a decree of nullity and if such party has any right, it would be enforceable by a suit. *Lakshmi Ammal v Ramaswami*

can seek relief under this section and not necessarily the aggrieved party.⁴⁵ A marriage which does not fulfil these three conditions is no marriage at all in law, being void *ipso jure* and it is open to the parties even without recourse to the court to treat it as a nullity (see ss 5(i), (iv) and (v)). Neither party is under any obligation to seek a declaration of nullity under this section though, of course, such a declaration may be asked for the purpose of precaution or record. It is competent for the parties whose marriage is null and void on the ground of *sapinda* relationship between them, to enter into marriage with another person at any time even if they had cohabited as husband and wife after the solemnisation of such marriage. Moreover, where the marriage is null and void on the ground that one of the parties to the marriage had a spouse living at the time of the marriage, the other spouse is competent to disregard such void marriage and enter into marriage with another person. A marriage which is void *ab initio* does not alter or affect the status of the parties, nor does it create between them any rights and obligations which must normally arise from a valid marriage, except such rights as are expressly recognised by the Act. Thus for instance, the provisions of ss 24 and 25 relating to maintenance pendente lite and costs and permanent alimony and maintenance, apply to parties to such marriage and it is competent to the court to pass any such order in a proceeding for a declaration of nullity of marriage under this section. Attention is now invited to the commentary under s 25 of this Act, and the decision of the Supreme Court in *Ramesh Chandra Daga v Rameshwari Daga*,⁴⁶ where the court has now held that the spouse of a null and void union, entered into during the pendency of an earlier marriage is entitled to maintenance, on the passing of a decree of nullity. Under the general law, the children born of a marriage void *ab initio* would be illegitimate and would not become entitled to any rights of a legitimate child. Section 16 of the Act, however, operates in favour of children born of such a marriage and in terms, lays down that even in case of a marriage void under the present section, the children begotten or conceived of the parties to such void marriage are to be deemed to be their legitimate children, notwithstanding any decree that may be passed by the court declaring the marriage to be null and void. Reference may be made to the comments under s 16 of the Act.

AIR 1960 Mad 6, 1959 1 MLJ 333; *Amarlal v Vijaybai* AIR 1959 MP 400. A first wife cannot present a petition under this section on the ground that the husband has gone through the ceremony of a second marriage which would be void, but she may seek relief on the grounds of adultery: *Kadar Nath v Suprava* AIR 1963 Pat 311.

⁴⁵ *Aina Devi v Bachan Singh* AIR 1980 All 174.

⁴⁶ *Ramesh Chandra Daga v Rameshwari Daga* (2004) 10 JT 366.

'ON A PETITION PRESENTED BY EITHER PARTY THERETO, AGAINST THE OTHER PARTY'

The words 'against the other party' were added in this section by the Amending Act of 1976, so as to make it clear that the petition may be presented only during the lifetime of the other party. In the undermentioned cases,⁴⁷ the view had been taken that an application under the section can be made by one spouse even after the death of the other. This would not be good law after the amendment.⁴⁸

REMARRIAGE BEFORE DISPOSAL OF APPEAL AGAINST DECREE OF NULLITY

See notes under s 15: 'Remarriage before disposal of appeal against decree of nullity under ss 11 and 12'.

12. Voidable Marriages.—(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:—

- (a) that the marriage has not been consummated owing to the impotence of the respondent; or
- (b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or
- (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or
- (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

⁴⁷ *Tulson Dett v Krishni Dett* AIR 1973 P&H 412; *Lakshmmamma v Tharayya* AIR 1974 AP 255; *Kusumkumari v Kusumkumari Jadeja* AIR 1977 MP 90 (after death of other spouse).

⁴⁸ *Gurcharan Kaur v Ram Chand* AIR 1979 P&H 206 (death of respondent husband pending appeal).

- (a) on the ground specified in clause (c) of sub-section (1) shall be entertained if—
 - (i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or
 - (ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;
- (b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied—
 - (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;
 - (ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of marriage; and
 - (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

AMENDMENTS

The amendments made in this section by the Amending Act of 1976, and by the Amending Act 2 of 1978, have been pointed out in the notes under the relevant clauses.

VOIDABLE MARRIAGE

The scheme of the Act is to treat marriage as valid, void and voidable. Attention has been drawn in the Introductory Note to the distinction drawn between a marriage void *ipso jure* and a marriage which is voidable at the instance of one of the parties to the same. A voidable marriage remains valid and binding and continues to subsist for all purposes, unless a decree is passed by the court annulling the same on any of the grounds mentioned in this section. The grounds, it will be noticed, involve the elements of incapacity of either spouse to consummate the marriage, want of mental capacity of the spouses, absence of free consent of the parties or of a guardian in marriage in case of a bride who had not completed the age of 18 years at the time of the marriage and *suppressio veri* by a woman who

was pregnant at the time of marriage. The High Court of Punjab and Haryana has held that a marriage cannot be declared as void under the section on the ground of non-performance of *saptapadi* as a result of unconsciousness of the wife during the ceremony, when the parties had lived together for a period of one year after the marriage.⁴⁹

CLAUSE (A): IMPOTENCE

Impotence had been understood in matrimonial cases as meaning incapacity to consummate the marriage, that is to say, incapacity to have conjugal intercourse, which is one of the objects of marriage. As pointed out by the Supreme Court,⁵⁰ a party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. It will be noticed that the amended clause places emphasis both on the factor of consummation and on impotence. The clause, prior to its amendment in 1976, stated that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding. By the Amending Act of 1976, the substituted clause emphasises the element of non-consummation of the marriage owing to the impotence of the respondent. Medical evidence may establish that the petitioner-wife has remained a virgin and the court may presume that the requirements of the amended clause are satisfied.⁵¹ The High Court of Punjab and Haryana has however held that a medical examination to prove virginity violates art 21 of the Constitution.⁵² It may be noticed that the question of curability or otherwise is not a relevant consideration.⁵³

In a case decided under the Hindu law prior to the coming into force of the present Act, it was held by the High Court of Calcutta⁵⁴ that the marriage of a female with a male who was impotent and who had not been able to consummate the marriage, was a nullity. In a case decided in Bombay,⁵⁵ the defendant wife suffered from permanent and incurable infirmity and the view was taken that it was competent to the court to grant a decree for nullity of marriage.

Where impotency was proved by medical evidence and the marriage had not been consummated, the marriage was voidable in view of s 12(1)(a).

⁴⁹ *Devi Sharma v Chander Mohan* AIR 2003 P&H 327

⁵⁰ *Digvijay Singh v Pratap Kumari* AIR 1970 SC 137; *Ushman v Inderjit* AIR 1977 P&H 90; *Venkateswararao v Nagamam* AIR 1962 AP 151; *Chamanlal v Rupa* AIR 1966 J&K 68 (burden of proof).

⁵¹ *Suvarna v GM Achary* AIR 1979 AP 169.

⁵² *Surjit Singh v Kanvaljit Kaur* AIR 2003 P&H 353.

⁵³ *Samar v Snigdha* AIR 1977 Cal 213.

⁵⁴ *Ratan Monti Devi v Nagendra Narain* AIR 1949 Cal 404.

⁵⁵ *A v B* (1952) 54 Bom LR 725

The limitation prescribed in sub-s (2) would be applicable only to grounds specified in cl (c) and (d) of sub-s (1).⁵⁶

Clause (a) of sub-s (1) makes it abundantly clear that a marriage solemnised whether before or after the commencement of the Act, is voidable at the instance of either party on the ground of non-consummation of the same due to the impotence of the other party to the marriage and may be annulled by a decree of nullity of marriage. A question as to the impotence of either party cannot be raised by a third person, because it is solely a personal matter for the spouses. Nor can it be raised after the death of one of them.⁵⁷ The petitioner's own infirmity, it will be noticed, does not afford a ground for relief under the Act. Under English law, the courts have exercised jurisdiction to grant such relief where the petitioner was not aware of his or her own infirmity at the time of the marriage and there was nothing in the circumstances of the case which would have rendered it unjust to grant such relief.⁵⁸ It is also clear that any such incapacity supervening after consummation of the marriage is no ground for relief.

CONSUMMATION: MEANING OF

The expression has to be understood as in common parlance and means 'ordinary and complete intercourse', but it would seem from decided cases in England that emission of seed, or possibility of procreation are not necessary ingredients as a matter of law. The decisions also go to show that full and complete penetration is an essential ingredient. The test is said to be penetration. The possibility of incipient or imperfect coitus is not enough to establish consummation but if complete coitus is established, discharge of semen in the wife's body is not a necessary condition of consummation.⁵⁹ The first thing to be considered in a case under this clause would be whether there has in fact been 'consummation' or not and where there has been no 'consummation', the inquiry must be whether it was due to impotence of the respondent.

INCAPACITY TO CONSUMMATE

A party is incapable of consummating the marriage if his or her mental health or physical condition makes consummation a practical

⁵⁶ *D Balakrishnan v Pavalamani* AIR 2001 Mad 147.

⁵⁷ *A v B* (1868) LR 1 P&D 559.

⁵⁸ *Harthan v Harthan* [1948] 2 All ER 639, [1949] P 115.

⁵⁹ *Baxter v Baxter* [1947] 2 All ER 886, [1948] AC 274; *W v W* [1967] 3 All ER 178 and cases therein cited in footnote; *Chanchal Kumari v Kewal Krishan* AIR 1972 P&H 474 and cases therein cited; *Samar v Snigdha* AIR 1977 Cal 213 (wife suffering from vaginismus); *Monia Khosla v Amardeep Khosla* AIR 1986 Del 399; *Sushila v Vijay Kumar* AIR 1982 Del 272.

impossibility. This condition is, generally spoken of as, impotency. Impotency contemplated in the section does not signify sterility or incapacity of conception but incapacity to have sexual intercourse.⁶⁰ The true test of impotency is the practical impossibility of consummation. The natural, inherent disabilities of a spouse leading to non-consummation could lead to a decree of dissolution.⁶¹ Cases of malformation or structural defects causing disability often arise for consideration under the head of practical impossibility. Either spouse is at liberty to ask for relief under this clause as soon as it is discovered that the other party is incapable of sexual intercourse from any malformation or structural defect or otherwise. Ordinarily and also as a matter of prudence, the court will insist on proof of this by medical evidence. It may be questioned whether the court can order physical examination in any case under the present head; but where a husband or wife refuses to submit to such examination the court may, if the facts and circumstances of the case so warrant, properly draw an unfavourable inference.⁶² The court, however, is not bound to draw such inference.⁶³ A defect of a spouse must be regarded as incurable either if the condition can be remedied by an operation attended by danger, or if the spouse at fault refuses to submit to an operation.⁶⁴ The court has to approach and deal with any such matter by looking at the matter from the practical point of view. A very belated offer to undergo an operation to correct a defect may be only an afterthought and not genuine or there may be no reasonable prospect of the incapacity being cured. In such case, the court would be justified in granting relief to the aggrieved spouse.⁶⁵

The mere fact that the uterus of the wife had been removed by an operation does not amount to impotency.⁶⁶ In spite of the small size of her

60 *Shewanti v Bhaurao* AIR 1971 MP 168; *Laxmi Devi v Babu Lal* AIR 1973 Raj 89 (it was held that there was incapacity to have conjugal intercourse even after an operation); *Nighawan v Nighawan* AIR 1973 Del 200; *P v K* AIR 1982 Bom 400 (prolapsed uterus—fraud); *Manjit Kaur v Surinder Singh* AIR 1994 P&H 5 (impotency and incapacity proved).

61 *Jyotsnaben v Pravinchandra Tulsidas* AIR 2003 Guj 222 (delay occasioned due to the peculiar facts condoned).

62 Referred to with approval in *Ravamma v Shanthappa* AIR 1972 Mys 157; *Venkatachalapathy v Saroja* AIR 1981 Mad 349 (infantile uterus—petition on ground of desertion); *Birendra Kumar Biswas v Hemlata Biswas* (1921) 48 Cal 283, 297. *Bipinchandra v Madhuriben* AIR 1963 Guj 250, (1963) 1 Guj LR 890, *contra Venkatanarayanan v K Laxmidevi* AIR 1985 AP 1 (court can appoint a doctor); *Jayaraj v Seeniammal* AIR 1967 Mad 242 (case under Indian Divorce Act 1869).

63 *Ratan Moni Debi v Nagendra Narain* AIR 1949 Cal 404, 407; *P v P* (1909) 25 TLR 638; *Ganeshji v Hastuben* (1967) 8 Guj LR 966 (medical evidence of respondent wife's potency); *Suvarnababen v Rashmikant* AIR 1970 Guj 43, the court was satisfied with the testimony of the wife about the husband's impotency. It was held that corroboration was not absolutely essential.

64 *S v S* [1954] 3 All ER 736, 741, [1954] P 194.

65 *M v M* [1956] 3 All ER 769.

66 *Samar Som v Sadhana Som* AIR 1975 Cal 413.

vagina a wife can be capable of intercourse and of giving birth to children and cannot be held to be impotent if the court on medical evidence is satisfied that the marriage is capable of consummation.⁶⁷ Nor can the mere fact of the wife refusing to have sexual relations with the husband amount to impotency of the wife.⁶⁸ This can be due to a variety of reasons and not on account of any incapacity to consummate the marriage.⁶⁹ The court may refuse to grant a decree of annulment if it is satisfied that the marriage, be it due to operation or otherwise, is capable of consummation.⁷⁰ Applying the test whether there was practical impossibility of consummation, it was held in a case in England that as on the material date the wife was willing to undergo and subsequently underwent an operation which remedied the impediment, the husband had failed to prove that the marriage had not been consummated owing to the wife's incapacity.⁷¹ In cases falling under this head, the following observations will be found useful:

The invalidity of the marriage, if it cannot be consummated on account of some structural difficulty, is undoubted; but the basis of the interference of the court is not the structural defect, but the fact that consummation has not taken place. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the interference of the court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting. The absence of a physical structural defect cannot be sufficient to render a marriage valid if it be shown that connection is practically impossible, or even if it be shown that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to.⁷²

It is important to notice in cases of this type that curability of impotency is not a determinative factor.⁷³

67 *Rajendra Parshad v Shanti Devi* (1977) 79 PLR 514.

68 *Brij Vallabh v Sumitra* AIR 1975 Raj 125.

69 Reference may be made to notes below under 'Wilful refusal of...marriage'.

70 *Rajender Parshad v Shanti Devi* AIR 1978 P&H 181.

71 *S v S* [1954] 3 All ER 736, [1954] P 194; *W Y v A Y* 1946 SC 27.

72 Per Lord Penzance in *G v G* 1871 LR 2 P&D 287, 291; *S v S* [1954] 3 All ER 736.

73 *Samar v Snigdha* AIR 1977 Cal 213; *P v K* AIR 1982 Bom 400.

INCAPACITY QUOAD THE PARTICULAR INDIVIDUAL

It is not absolutely necessary that the incapacity to perform the act of coitus must be general because a person may generally be capable of the act and yet incapable of it with a particular individual. Relief can be granted in cases of impotence *quoad hunc* or *quoad hanc*.⁷⁴

WILFUL REFUSAL OF THE RESPONDENT TO CONSUMMATE MARRIAGE

Section 25(10) of the Special Marriage Act 1954 and s 12(b) of the Matrimonial Causes Act 1973 in England give wilful refusal of the respondent to consummate the marriage as an additional ground for decree of nullity of marriage by declaring that in such a case the marriage is voidable. The Matrimonial Causes Acts of 1950 and 1937, also contained similar provisions. Prior to that, the view taken in England was that such refusal did not in itself empower the court to annul the marriage on the ground of impotency. It was, however, held that when after a reasonable time of the marriage; it was shown that the wife had refused intercourse and resisted all attempts by the husband without just cause and the court was satisfied of the bona fides of the suit, it was at liberty to infer that the refusal was wilful and arose from incapacity to consummate the marriage. Wilful refusal in this context connotes a settled and definite decision to do so without just excuse. It does not mean a mere temporary unwillingness due to a passing phase or a nervous ignorance, which may be got rid of or cured by patient forbearance, care, kindness and tact.⁷⁵ There is no provision in the present enactment similar to that in the enactments mentioned above, but in cases decided under the Indian Divorce Act 1869, the same view had been taken following the earlier decisions on the subject of courts in England. Incapacity to consummate the marriage need not necessarily be physical. It may be due to mental causes as well. There can be cases of invincible repugnance to the act of intercourse, either generally or with the particular individual. This can arise from a variety of causes; from nervousness⁷⁶ or excessive sensibility,⁷⁷ though 'hysterical' or 'unconquerable aversion' may be more usual.⁷⁸ It is

⁷⁴ *C v C* (1921) P 399; *H v P* (1873) LR 3 P & D 126; *J v J* (1908) 24 TLR 622; *DE v AG* (1845) 1 Rob Eccl 279; *Jagdish Lal v Shyama* AIR 1966 All 150.

⁷⁵ *Horton v Horton* [1947] 2 All ER 871, 874; *Baxter v Baxter* [1947] 1 All ER 387 (case of acquiescence); *Potter v Potter* (1975) Family Law 161 (CA); *Sunil Mirchandani v Reena* AIR 2000 Bom 66 (non-consummation not proved on contrary evidence).

⁷⁶ *F v P* (1897) 75 LT 192.

⁷⁷ *G v G* (1871) LR 2 P 287.

⁷⁸ *Kishore Sahu v Snehaprabha Sahu* AIR 1943 Nag 185, 191; *Jagdish Kumar v Sita Devi* AIR 1963 Punj 114; *Shanta Bai v Tarachand* AIR 1966 MP 8.

true that the common area covered by suits on the ground of impotence and wilful refusal to consummate the marriage is very small. It is quite possible that both the grounds may be present at the same time and it is submitted that in case a wilful refusal to consummate the marriage persisted until the institution of the proceeding, the court would be at liberty to infer incapacity and grant relief under the present clause where it is sought after a reasonable time of marriage and the court is satisfied that the petition is bona fide. This would be after taking into consideration all the facts and history of the case because in cases of this nature, the danger of collusion is great and the court has to be watchful that it is not imposed upon.

DELAY IN INSTITUTING PROCEEDINGS

Reference may be made to notes under s 23(d)—‘Delay and proceeding for nullity on ground of impotence’. Reference may also be made to the undermentioned cases.⁷⁹

DOCTRINES OF ‘INSINCERITY’: ‘APPROBATION’

In England, it is not unusual to speak of the plea of insincerity in the context of proceedings for nullity. Any such consideration, in order to be relevant, would have to fall within the ambit of cl (a) of s 23(1) which disentitles a person to any relief where it is established that he or she is taking advantage of his or her wrong or disability for the purpose of such relief. It would seem unnecessary for courts in India to act upon the undefined concept of doctrine of insincerity. In *S v R*, the Delhi High Court⁸⁰ examined these doctrines and expressed the view that these doctrines were inapplicable to cases under the present section. Of course, the court in applying s 23(1)(a) would decline to give relief in a proceeding for nullity where the facts and circumstances proved, plainly imply on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable that he or she should be permitted to challenge the validity of the marriage. In cases of this kind, many sorts of conduct might exist, taking for example, pecuniary benefit. However, the court must be fully satisfied that the facts and circumstances of the case bring the case clearly within the ambit of the rule laid down in that section.⁸¹

79 *Shankuntala Devi v Amar Nath* AIR 1982 P&H 221 (annulment sought after five years of marriage on allegation of fraudulent obtaining of consent—delay unexplained—relief refused); *Sarlabai v Komal Singh* AIR 1991 MP 358 (annulment sought after eight years on allegations about non disclosure of heart disease of wife—clearly barred).

80 AIR 1968 Del 79.

81 *A v B* AIR 1967 Punj 152. Reference may be made to the observations of LC Selborne in *G v M* [1885] AC 171, 185–86.

CLAUSE (B): MARRIAGE WITH A PERSON OF UNSOUND MIND OR ONE SUFFERING FROM MENTAL DISORDER—SECTION 5(ii)

One of the conditions of a marriage under the present Act, as already pointed out under s 5(ii), is that either spouse must have the requisite mental capacity to enter into matrimony. However, a marriage in contravention of that provision, if it has taken place, is not void per se but only voidable under this clause. Under English law, a person of unsound mind is incapable of consent and the marriage of such a person is automatically void. The rule laid down in the present clause, it will be noticed, is different. Presumably, this rule was enacted in view of the difficulties felt and the opinions expressed in the undermentioned cases decided on general principles of Hindu law.⁸² An objection to a marriage on the ground of mental incapacity must depend on a question of degree of the defect in order to rebut the extremely strong presumption in favour of the validity of a marriage, which has in fact taken place.

Reference may be made to notes under s 5(ii).

AMENDMENT

Before its amendment in 1976, the terms of s 5(ii) were 'neither party is an idiot or a lunatic at the time of the marriage'. That condition has now been more extensively stated and the amended provision now speaks of 'unsound mind' and 'mental disorder' as explained in the amended section. Reference can be made to the undermentioned cases on the subject of 'idiot'⁸³ and 'lunatic'.⁸⁴

BURDEN OF PROOF

The onus of bringing a case under this clause lies heavily on the petitioner who seeks annulment of the marriage on the ground of unsoundness of mind or mental disorder. The court will examine the matter with all possible care and anxiety.⁸⁵ The degree of proof under this section is lighter than that under s 13 of the Act.⁸⁶

82 *Amirthammal v Vallimayil Ammal* AIR 1942 Mad 693, *Ratneshwari Nandan v Bhagwati Saran* (1949) FCR 715, AIR 1950 FC 142.

83 *Surti v Narain Das* (1890) 12 All 530, 533.

84 *Amma Roy v Moban Roy* AIR 1969 Cal 304, *Pronab Kumar v Krishna* AIR 1975 Cal 109 (schizophrenia proved).

85 *Pronab Kumar v Krishna* AIR 1975 Cal 109.

86 *Alka Sharma v Abhinesh Sharma* AIR 1991 MP 205.

CLAUSE (C): CONSENT OBTAINED BY FORCE OR FRAUD

The ceremonial marriage under the Act, although it creates a relation and a status not imposed or defined by contract, does require the consensus of the parties to the solemnisation of it. Considering the background of the system of arranged marriages, consent would include consent given as a result of negotiations made on behalf of the person by the parents.⁸⁷ Absence of consent does not render the marriage void *ipso jure* but voidable at the instance of the party whose consent was obtained by force or fraud. Clause (c) of sub-s (1), which has to be read with cl (a) of sub-s (2), lays down the rule relating to annulment of such voidable marriage. The rule is not absolute and will not operate if:

- (i) the petition is presented more than one year after the force ceases or the fraud is discovered; or
- (ii) the petitioner has with his or her full consent and knowledge acquiesced in the marriage by living with the other party to the marriage as husband or wife.

FORCE

Where consent of a party to solemnisation of marriage is obtained by force, or as it is sometimes said by coercion or duress, it is obvious that there is absence of a consenting will to marry. Force, when it is used excludes any real or intelligent consent altogether. In two English cases, *Scott v Sebright*⁸⁸ and *Ford v Stier*,⁸⁹ marriages were avoided in extremely peculiar circumstances on the ground of combined fraud and coercion having operated on the wife to such an extent that the marriage was not her voluntary act. The test to be applied is whether there was any real consent to the solemnisation of the marriage. In *Szechter v Szechter* in England, it was observed that in order for the impediment of duress to vitiate an otherwise valid marriage, it must be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat or immediate danger, for which the party itself is not responsible, to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock.⁹⁰

⁸⁷ Ibid.

⁸⁸ (1886) 12 PD 21.

⁸⁹ [1896] P 1; *Annjana Desi v Prahlad* (1871) 6 Beng LR 243.

⁹⁰ *Szechter v Szechter* [1970] 3 All ER 905 (case law discussed). In *Purabi v Basudeb* AIR 1969 Cal 293 (allegations of fraud and coercion were disbelieved—case under Special Marriage Act 1954).

FRAUD

It is essential to note that the section does not speak of fraud in any general way or of every misrepresentation or concealment which may be fraudulent but fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent.

There can be no doubt that if fraud is practised on a party as to the nature of the ceremony, the case would fall under this clause. Such for instance, would be a case where a party is kept under the impression that what is being performed is only a betrothal or a conversion to Hindu religion.

The clause prior to its amendment by the Amending Act of 1976, did not contain the words 'or is to any material fact or circumstance concerning the respondent'. These words were added in 1976. In cases prior to the amendment, it was held that a person who freely consented to a solemnisation of the marriage with knowledge of the nature of the ceremony and intention to marry could not avoid the marriage by showing that the petitioner was induced to marry the respondent by fraudulent statements relating to family or fortune or caste or religion or age or character of the respondent.⁹¹ The operation of the clause was considerably extended so as to include within its ambit, any material fact or circumstance concerning the respondent. Whether a misrepresentation or false statement or concealment is as to any such material fact, must to a large extent depend on the facts and circumstances of the case. However, it must be something vital, touching or affecting the respondent and such as had definitely induced or influenced consent. The petitioner must show that, but for such false representation or statement or concealment, he or she would not have married the respondent.⁹² Clear, unambiguous disclosures by parties to a marriage as

91 *Raghunath v Vijaya* AIR 1972 Bom 132 (concealment as to state of health—epilepsy); *Harbhajan Singh v Brij Balab* AIR 1964 Punj 359 (character and moral conduct); *Srjit Kumar v Raj Kumari* AIR 1967 Punj 172 (past unchastity); *Rani Bala Debnath v RK Debnath* 73 CWN 751; *Rajarain v Deepabai* AIR 1974 MP 52; *Madhusudan v Chandrika* AIR 1975 MP 174; *Nandkishore v Munnibai* AIR 1979 MP 45; *Srikantaradhya v Kamalamma* AIR 1984 Kant 236 (white patches on the girl's cheek seen before consenting to marriage); *Bimla Bai v Shankulal* AIR 1959 MP 8 (legitimacy—caste); *Babui Panmato v Ram Agya Singh* AIR 1968 Pat 190 (age must be doubted).

92 *Gurmeet Kaur v Narinder Singh* (1978) 80 PLR 507 as to the identity of the girl, girl shown before marriage was different (appearance). As to concealment of age, reference may be made to *Som Dutt v Raj Kumari* AIR 1986 P&H 191; *Balbir Kaur v Maghar Singh* AIR 1984 P&H 417 (deformity of a material nature not disclosed); *Kiran Bala v Bhaire Prasad* AIR 1982 All 242 (fact that respondent's earlier marriage was annulled on ground of unsoundness of mind was concealed—the ground for dissolution of marriage was under s 13(i)(iii)); *P v K* AIR 1982

continued on the next page

regards their pre-marital status may not, on the facts amount to fraud and the marital ties would not be liable to be annulled on that ground.⁹³

Prior to its amendment by the Amending Act of 1957, cl (c) stated 'that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under s 5, the consent of such guardian, was obtained by force or fraud'. Section 5(iv), prior to its amendment in 1976, stated: 'where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage'. After the amendment of s 12(1)(c), fraud practised on each guardian as to any material fact or circumstance concerning the respondent, also fell within the purview of cl (c).

The Child Marriage Restraint (Amendment) Act 2 of 1978, amended certain provisions of the present Act and attention has already been drawn to the same under the relevant sections. The present cl (c) was substituted by Act 2 of 1978, and read with s 5 lays down the law relating to the effect of force or fraud in a case of a Hindu marriage solemnised under s 5.

PLEADING

It is well-settled that under the rules of pleading, mere mention of fraud or fraudulent act of concealment is totally ineffective in the absence of particulars of such fraud.⁹⁴

CONDONATION

A solitary act of intercourse after knowledge of fraud may not amount to condonation of fraud.⁹⁵

CLAUSE (D)—RESPONDENT WIFE PREGNANT AT THE TIME OF MARRIAGE

Any marriage, whether solemnised before or after the commencement of the Act, is voidable at the instance of the husband on the ground that the

Bom 400 (fact of prolapsed uterus concealed); *Asba Srivastava v R K Srivastava* AIR 1981 Del 253 (concealment of factum of wife suffering from incurable schizophrenia); *Rajinder Singh v Ponilla* AIR 1987 Del 285 (facts of previous marriage, not disclosed by husband, meaning of 'fraud'); *Sasanka Shekhar v Dipika* AIR 1993 Cal 203 (suit based on allegation that wife was not a Hindu—concealed); *Ramakanta v Mohinder* AIR 1996 P&H 98 (fact of earlier marriage child by earlier marriage concealed); *Anurag Anand v Sumita* AIR 1997 Del 94; *A Premchand v Padmarya* AIR 1997 Mad 135.

93 *Permindar Charan Singh v Harjit Kaur* AIR 2003 SC 2310; *Prakash Singh Thakur v Bharati* AIR 2001 MP 1.

94 *Kartik Chandra* supra; *Bishun Deo v Seogani Rani* AIR 1951 SC 278, 283.

95 *Bippar Singh v Mohinder Kaur* AIR 1981 P&H 391.

respondent wife was at the time of the marriage pregnant by some person other than the petitioner, provided the conditions laid down in sub-s (2)(b) are strictly fulfilled. However, where the husband was aware that the wife was pregnant at the time of marriage and had intercourse with her on his consenting to do so, after knowledge of the fact of pregnancy, the marriage could not be voidable.⁹⁶ The basis of the rule is *suppressio veri* by a woman who was pregnant at the time of marriage. The rule applies only in case of pregnancy *per allium*. The onus of proof, which requires the husband to establish his case beyond reasonable doubt, does not extend to establishing the scientific impossibility of his being the father of the child. In *Mahendra Nanavati v Sushila Nanavati*, the Supreme Court held that in a petition founded on this clause, read with sub-s (2)(b)(i), the petitioner has to establish such facts and circumstances which would lead the court either to believe that the respondent was pregnant at the time of marriage by someone else or to hold that a prudent man would, on those facts and circumstances, be completely satisfied that it was so and has also to establish that he was at the time of the marriage ignorant of the fact that the respondent was pregnant by some person, other than the petitioner. The child was born 171 days after the first coitus between the petitioner and the respondent wife. The delivery was normal and the child born was also normal. It was held that the child was not a child born after gestation of only 171 days and the petitioner was not the father of the child.⁹⁷ Reference may also be made to notes to s 23 on 'Admission of parties'. Reference may also be made to the undermentioned case where the respondent was held to have been pregnant at the time of marriage on medical evidence of a doctor having knowledge of midwifery as an obstetrician of high order.⁹⁸ The evidence was examined by the Supreme Court in this case where a child was born after 224 days of the marriage.

It is incumbent on the petitioner to plead and for the court to find that the conditions laid down in the various sub-clauses of sub-s (2)(b) are strictly fulfilled. The burden of proof rests on the petitioner.⁹⁹

96 *Rangabhattar v C Choodamani* AIR 1992 AP 103.

97 *Mahendra Manilal Nanavati v Sushila Mahendra Nanavati* AIR 1965 SC 364, *Preston Jones v Preston Jones* AIR 1951 Cal 391 (360 days), *Nisbit Kumar v Anjali* AIR 1968 Cal 105 (167 days); *Vira Reddi v Keslamma* AIR 1969 Mad 235 (402 days), *Maganlal v Bai Dahi* AIR 1971 Guj 33 (313 days). As to burden of proof in these cases, see *Mahendra Nanavati v Sushila Nanavati*, *Nisbit Kumar v Anjali* cited above, *Pawan Kumar v Mukesh Kumari* AIR 2001 Raj 1 (wife pregnant at the time of marriage).

98 *Balder Raj v Urmila Kumari* AIR 1979 SC 879, *Pawan Kumar v Mukesh Kumari* AIR 2001 Raj 1.

99 *Nandkishore v Munnibai* AIR 1979 MP 45.

BLOOD TEST

There is no provision in Indian law regarding jurisdiction of the court to order blood tests in matrimonial proceedings. In *S v S*,¹ the House of Lords in England had occasion to examine the question in the context of paternity proceedings. It is a well-established principle that a person of full age and capacity cannot be ordered to undergo a blood-test against his will. In England, s 21(1) of the Family Law Reforms Act deals with the matter.

SUB-SECTION (2)(A)(II)

The application of the condition laid down in this clause does not depend upon the lapse of any time after the discovery of the alleged fraud. If it is shown that the husband or the wife, as the case may be, after the fraud was discovered, lived together for whatever period as wife and husband with full consent, would be sufficient for rejecting the petition for annulment.²

SUB-SECTION (2)(B)(II)

The condition laid down in sub-s (2)(b)(ii) that the petition must be filed within one year, as therein prescribed, is absolute and a petition will not lie under this clause after that period has lapsed, even if fraud had been practised on the petitioner in the matter of the pregnancy by concealment of the truth.³ The condition as to the time within which proceedings under cl (d) of sub-s (1) must be instituted is absolute and mandatory. The sub-section does not prescribe a period of limitation but enacts a statutory bar to the entertainment of the petition. Hence, a petition for nullity of marriage filed under that clause on the day on which the court opened after the long vacation cannot be entertained even though the period of one year expired during the vacation.⁴

REMARRIAGE BEFORE DISPOSAL OF APPEAL AGAINST DECREE OF NULLITY

See notes under s 15, 'Remarriage before disposal of appeal against decree of nullity under ss 11 and 12'.

1 [1970] 3 All ER 107 (HL); *T(H) v T(E)* [1971] 1 All ER 590.

2 *Raghunath v Vijaya* AIR 1972 Bom 132; *Nandkishore v Munnibai* AIR 1979 SC 879.

3 *Vellinayagi v Subramaniam* AIR 1969 Mad 479; *Pranab Biswas v Mrinmayee Dassi* AIR 1976 Cal 156; *Rangaswamy v Nagamma* AIR 1973 Mys 178; *Nandkishore v Munnibai* AIR 1979 MP 45.

4 *Savilaram v Yeshodabai* AIR 1962 Bom 190, (1962) Bom 326, 64 Bom LR 27; *Pranab Biswas v Mrinmayee Dassi* AIR 1976 Cal 156.

13. Divorce.—(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

- (i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
- (ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or
- (ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or
- (ii) has ceased to be a Hindu by conversion to another religion; or
- (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

- (a) the expression ‘mental disorder’ means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;
- (b) the expression ‘psychopathic disorder’ means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or
- (iv) has been suffering from a virulent and incurable form of leprosy; or
- (v) has been suffering from venereal disease in a communicable form; or
- (vi) has renounced the world by entering any religious order; or
- (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

Explanation.—In this sub-section, the expression ‘desertion’ means

the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

- (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
- (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

- (i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of petition; or

- (ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality; or
- (iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act 1956 (18 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure 1898 (5 of 1898)) a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;
- (iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.—This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act 1976 (68 of 1976).

AMENDMENTS

The section, prior to its amendment by the Marriage Laws (Amendment) Act 68 of 1976, was as under:

- (i) is living in adultery; or
- (ii) has ceased to be a Hindu by conversion to another religion; or
- (iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition; or
- (iv) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy; or
- (v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form; or
- (vi) has renounced the world by entering any religious order; or
- (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive.

(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

- (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or
- (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground—

- (i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of petition; or

- (ii) that the husband has, since solemnisation of the marriage, been guilty of rape, sodomy or bestiality.

Prior to the Amendment in 1976, this section had been amended by the

Hindu Marriage Amendment Act 44 of 1964. Clauses (viii) and (ix) of sub-s (1) were omitted and in their place sub-s (1A) was inserted. Clauses (viii) and (ix) which were deleted were as under:

- (viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against the party; or
- (ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.

UTTAR PRADESH ACT 1962 (13 OF 1962)

Section 2 of this Act is as under:

Amendment of s 13 of Act 25 of 1955—In sub-s (1) of s 13 of the Hindu Marriage Act 1955:

(a) after cl (i) the following new clause shall be inserted and shall be deemed always to have been inserted:

‘(i-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party or’
and

(b) for cl (viii) the following clause shall be substituted and shall be deemed always to have been substituted:

(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and—

- (a) a period of two years has elapsed since the passing of such decree; or
- (b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the other party; or

In *Chandra Mohini v Srivastava*,⁵ the Supreme Court held that sub-cl (b) above is not an independent provision. It still requires a decree of judicial separation being passed, and then only a decree for divorce may follow without waiting for two years. The court cannot forthwith pass a decree of divorce under this sub-clause.

GROUND FOR DIVORCE AND JUDICIAL SEPARATION

Under the Act, as now amended (s 10(1)), the grounds on which a decree for judicial separation may be passed are identical to that required in respect

⁵ AIR 1967 SC 581.

of a decree for divorce. It may be noticed that cruelty and desertion, which were not per se grounds for divorce under this section, are now made grounds for divorce. A court cannot set up a new case on facts not pleaded and grant a divorce.⁶

ALTERNATE RELIEF IN DIVORCE PROCEEDINGS

In case of certain grounds for divorce, the court now has the discretion under s 13A to pass instead a decree only for judicial separation.

PENDING PETITIONS AND PROCEEDINGS

Section 39 of the Marriage Laws (Amendment) Act 1976, makes special provision as to matrimonial causes in respect of which petitions or proceedings were pending at the time of coming into operation of the Amending Act (wef 27 May 1976):

39. Special provision as to pending cases.—(1) All petitions and proceedings in causes and matters matrimonial which are pending in any court at the commencement of the Marriage Laws (Amendment) Act 1976, shall be dealt with and decided by such Court—

(i) if it is a petition or proceeding under the Hindu Marriage Act as amended by this Act;

(2) In every petition or proceeding to which sub-s (1) applies, the court in which the petition or proceeding is pending shall give an opportunity to the parties to amend the pleadings, insofar as such amendment is necessary to give effect to the provisions of sub-s (1), within such time as it may allow in this behalf and any such amendment may include amendment for conversion of a petition or proceeding for judicial separation into a petition or proceeding, as the case may be, for divorce.'

It has been held in *Sundari Dasi v Basudeo Lal*⁷ that the amended provisions of s 13(1) are intended to apply not merely to petitions pending in the trial court, but also to proceedings pending in appeal. Leave to amend a petition for judicial separation was accordingly granted by placing reliance on s 39 above.

LIBERAL CONSTRUCTION

It has now become the settled practice of the courts to give liberal interpretation to the provisions of this Act in the method of certain reliefs to be granted under it. Certain broad general observations of the Supreme

⁶ *Santosh v Ashok* AIR 2001 Del 422.

⁷ AIR 1977 Cal 193.

Court in *Reynolds Rajamani v Union of India*,⁸ though under s 10 of the Divorce Act, it is submitted should be of considerable help and guidance in the matter of interpretation of the provisions also of the present Act:

The history of all matrimonial legislation will show that at the outset, conservative attitude influenced the grounds on which separation or divorce could be granted. Over the decades a more liberal attitude has been adopted, fostered by a recognition of the need for individual happiness of the adult parties directly involved. But although the grounds have been liberalised, they nevertheless continue to form an exception to the general principles favouring the continuation of the marital tie.... It is another matter that in construing the language in which the grounds are incorporated the courts should give a liberal construction to it. Indeed we think that the courts must give the fullest amplitude of meaning to such a provision. However, it must be meaning that the language of the section is capable of holding.

It cannot be extended by adding new grounds not enumerated in this section.⁹ The High Court of Rajasthan has held that the mere existence of grounds for a divorce is not enough. There must be clear findings of marital discord and wrong doing which could result in a decree.¹⁰

Thus, the section cannot, by any means, be stretched by adding to it what the legislature has thought proper to restrict.¹¹ Lapse of time in litigation cannot be termed as a ground to hold that the marriage is dead.¹²

A decree of divorce cannot per se be granted on the basis of allegations made in the pleadings, because as stated earlier, what has not been stipulated by the legislature, cannot be read into or imputed in the section. In order to arrive at a definite conclusion that the marriage has irretrievably broken down, the court must endeavour to analyse the attendant circumstances in order to determine the veracity of such allegations before arriving at a

8 AIR 1982 SC 1261; *Smita Dilip Rana v Dilip Dattaram Rana* AIR 1990 Bom 84 (that marriage has irretrievably broken down is not a ground for divorce); *Amarthala Hemalatha v Desari Ballu Rejendra Varaprasad* AIR 1990 AP 220.

9 *Sarlahai v Komal Singh* AIR 1991 MP 358 (heart disease cannot be a ground for divorce).

10 *Rajneesh v Savita* AIR 2003 Raj 280.

11 *Nitu v Krishnalal* AIR 1990 Del 1; *Ashok Kumar v Shabnam* AIR 1989 Del 121; *Umashanker Joshi v Rajeswari* AIR 1991 Raj 149; *A v H* AIR 1993 Bom 70; *Rajinder v Anita* AIR 1993 Del 135 (irretrievable breakdown of marriage—no new ground can be added, allegations made for the first time in written statement cannot be considered); *Sudhir Singhal v Neeta Singhal* AIR 2001 Del 116; *Geeta Mullick v Brojo Gopal Mullick* AIR 2003 Cal 321 (irretrievable breakdown by itself not a ground for dissolution); *Arunima Bhattacharjee v Shyama Prasad Bhattacharjee* AIR 2004 Cal 161 (irretrievable breakdown by itself not a ground for dissolution).

12 *Swapan Kumar v Smritikans* AIR 2002 Cal 6 (no decree only on ground of irretrievable breakdown); *Neeta Desai v Bino Samuel* AIR 2003 Bom 7.

conclusion.¹³

Where the parties have lived apart for a number of years and the chances of reconciliation are bleak, a decree of divorce on the basis of irretrievable breakdown of marriage could be granted on the facts.¹⁴ Irretrievable breakdown of a marriage cannot be invoked if the spouses are not *ad idem* as regards such a situation, and there is a genuine desire by one spouse to continue the marriage.¹⁵ A husband cannot claim desertion when there are proven facts of adultery on his part. He cannot be permitted to take advantage of his own wrong, and claim that the matrimonial tie has irretrievably broken down.¹⁶

DIVORCE

Unless allowed by custom, divorce was not recognised by the general Hindu law as administered by courts in British India. Subject to the exception relating to the right where it is recognised by custom,¹⁷ divorce is entirely statutory. When the material on record does not show the existence of a custom of divorce on the basis of which the purported deed of divorce is entered into and custom has not even been pleaded, divorce cannot be granted on the basis of custom.¹⁸ It is conceded in all jurisdictions that public policy, good morals and the interests of society require that the marriage relation should be surrounded with every safeguard, and its severance allowed only in the manner and for the cause specified by law. Divorce is not favoured or encouraged, and is permitted only for grave reasons. Moreover, even when any ground laid down in the section exists, the court will not as a general rule entertain a petition for divorce within one year of the marriage (s 14). That limitation of one year will show that the intention of the legislature was to provide for opportunities for mutual adjustment and reconciliation.

13 *V Bhagat v D Bhagat* AIR 1994 SC 710, on the facts, divorce decreed; *Romesh Chander v Savitri* AIR 1995 SC 851 (on the facts of the case, decree of divorce granted); *Kanchan Devi v Pramod Kumar* AIR 1996 SC 3192 (spouses living apart for more than a decade divorce decreed); *Sneh Prabha v Ravinder Kumar* AIR 1995 SC 2170 (efforts at reconciliation failing, conclusion of irretrievable breakdown arrived at, dissolution decreed); *Rajan Revankar v Shobha* AIR 1995 Bom 246 (conduct during pendency of proceedings, held marriage broken down, divorce decreed); *Renu v Sanjai Singh* AIR 2000 All 201 (case under the UP Amendment); *Chiranjeev v Lavanya* AIR 1999 AP 316; *Pawan Kumar v Chanchal* AIR 1999 P&H 108; *Gajendra v Madhu Malti* AIR 2001 MP 299; *Sabitanajli v Priyabrata* AIR 2001 Ori 84 (mutual hatred and dislike); *Praveen Mehta v Indrajit Mehta* AIR 2002 SC 2582 (leaving home, not returning—inference of irretrievable breakdown drawn); *Amita v KR Kachba* AIR 2003 Bom 273.

14 *Susmita Acharya v Rohindra Kumar Mishra* AIR 2003 Ori 23.

15 *Kakali Das v Ashish Das* AIR 2003 Cal 287.

16 *Chetan Dass v Kamla Devi* AIR 2001 SC 1709.

17 Sections 29(2) and § 441 Vol I.

18 *Yamnaji Jadhav v Nirmala* AIR 2002 SC 971.

A decree of divorce, as a rule, operates from the moment it is pronounced. The rule laid down in s 15 that neither spouse can marry again, until the time for appeal has expired, in no way affects the operation of the decree. Subject to this limitation relating to remarriage by either spouse, the effect of a decree of divorce is to dissolve the marriage for all intents and purposes from the date of its pronouncement. The Act does not provide for passing of decree *nisi* and decree absolute, as for instance, is done under the Indian Divorce Act (see notes under s 15).

Attention has already been drawn in the Introduction to the scheme of the Act and the distinction made between grounds on which a decree of nullity of marriage can be passed, and grounds on which dissolution of marriage may be decreed. In case of divorce, the marriage having been duly solemnised and itself not being void or voidable, is dissolved by the court for reasons mostly arising after the marriage.

CLAUSE (I): ADULTERY

It must be noticed that after the Amending Act of 1976, a petition for divorce can lie at the instance of the husband or the wife, if the other party has after the solemnisation of the marriage committed even a single act of adultery. It must also be noticed that to bring a case under this section it is not necessary now to show that the respondent is living in adultery.¹⁹ The benefit of this liberalised provision can be availed of even in an appeal pending at the commencement of the amending Act.²⁰ It must have also been noticed that the expression 'adultery' has not been used in this clause and instead, the words are 'had voluntary sexual intercourse with any person other than his or her spouse'. Adultery in matrimonial law is one of the principal grounds for relief, and has been defined as consensual sexual intercourse between a married person and another person of the opposite sex during the subsistence of the marriage. An attempt to commit adultery must be distinguished from adultery, and will not of itself be sufficient ground for relief.²¹

19 *Re Fulchand* 1928 30 Bom LR 79; *Kallu v Kausilia* 1904 26 All 326; *Patala Atchamma v Patala Mahalakshmi* (1907) 30 Mad 332; *Jatindra Mohun v Gouri Bala* 1924 29 CWN 647; *Chanda v Nandu* AIR 1965 MP 268; *Rajani v Prabhakar* AIR 1958 Bom 264; *Bhagwan Singh v Amar Kaur* AIR 1962 Punj 144; *Maganlal v Dabi* AIR 1971 Guj 33; *Pattayee Ammal v Manickam* AIR 1967 Mad 254; *Bhagwan Singh v Amar Kaur* AIR 1962 Punj 144; *Vira Reddy v Kistamma* AIR 1969 Mad 235.

20 *NC Dass v Chin Mayee Dass* AIR 1982 MP 120.

21 As to what constitutes adultery as a matrimonial offence, see *Dennis v Dennis* [1955] 2 All ER 51, [1955] P 153; *Sapsford v Sapsford* [1954] 2 All ER 373, [1954] P 394.

Direct proof of adultery is not imperative.²² It would be unreasonable to expect direct evidence and such evidence if brought before the court, must be suspected and is apt to be disbelieved. The accepted rule, therefore, is that circumstantial evidence is all that can normally be expected in proof of the charge. The circumstances must be such as to lead to fair inference, as a necessary conclusion; and unless this was so, no protection whatever could be given to marital rights. It is impossible to indicate those circumstances universally, because they might be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have important bearing upon the particular case. The only general rule upon the subject is, that the circumstances must be such as would lead the guarded judgment of a reasonable and just man to the conclusion. The facts usually are not of a complicated nature, but determinable upon common grounds of reason. It is in consequence of this rule that it is not necessary to prove a fact of adultery in time and place.²³ Nor is it absolutely incumbent on the petitioner to prove the identity of the person with whom the alleged act of adultery took place. A spouse is not entitled to a decree on allegations arising out of suspicion created by surrounding circumstances, for such allegations would have to be proved. Mere suspicion is not enough to avail of a remedy under the section.²⁴ The High Court of Madhya Pradesh distinguishing the judgment of the Supreme Court in *V Bhagat v D Bhagat*²⁵ and *Chetandass v Kamladevi*,²⁶ and the decision of *Chandralekha Trivedi* has held that when alleged serious allegations about the character of the spouse were not proved and he had also not cooperated in reconciliation proceedings, no decree of divorce could be passed.²⁷

Proof required to prove adultery, need not necessarily be what is at times said to be proof beyond a shadow of doubt. 'It need not reach certainty, but must carry a high degree of probability'.²⁸ The court does not as a general rule infer adultery from evidence of opportunity alone, but would require some more satisfactory proof. Something more than opportunity and evidence of inclination or passion is generally needed. In respect of what

22 *Arinash Prasad v Chandra Mohini* AIR 1964 All 486; *Deryani v Kantilal* AIR 1963 Bom 98; *Vedavalli v Ramaswamy* AIR 1964 Mys 280; *Pattayee Ammal v Manickam* AIR 1967 Mad 254; *Varadarajulu v Baby Ammal* AIR 1965 Mad 29 (surrounding circumstances); *Sanjukta Pradhan v Luxminarayan Pradhan* AIR 1991 Ori 39.

23 *Loveden v Loveden* (1810) 2 Hag Con 1; *Hearsey v Hearsey* AIR 1931 Oudh 259; *Barker v Barker* AIR 1955 MB 103.

24 *Arun Kumar v Nalin* AIR 2003 Kant 25.

25 AIR 1994 SC 710.

26 AIR 2001 SC 1709.

27 *Sanjeev Prashar v Mithilesh Kumar* AIR 2004 MP 77.

28 *Miller v Minister of Pensions* [1947] 2 All ER 372-73; *Subbarama v Saraswathi* AIR 1967 Mad 85.

was known in England as the *Hotel Bill and Register* case,²⁹ where the evidence consisted of an entry in a hotel register and of the respondent being seen in a bedroom with an unknown woman, the view was expressed that the court would insist upon evidence of background of an adulterous association. Apart from evidence of opportunity, there should be some evidence of disposition on the part of the respondent. This may be proved by showing that, prior or subsequent to the alleged fact, there had been improper familiarity between the parties or other circumstantial facts. Evidence of the conjunction of strong inclination or disposition and opportunity would be strong *prima facie* evidence, but there is no rule of law that such evidence raises an irrebuttable presumption that adultery has been committed.³⁰ The mere fact that some male relative of the respondent had written most improper letters to her is not of itself sufficient to prove adultery.³¹

LONG PERIOD OF GESTATION: NON-ACCESS

A charge of adultery may be based on non-access and long period of gestation of a child born to the wife. In a case decided by the House of Lords in England, the only evidence of adultery was the birth of a normally developed child, 360 days after last marital intercourse between the parties. A decree was granted in favour of the husband, and the court reviewed the question of the value of medical evidence on the subject. Lord Simonds observed³² that it would be a fantastic suggestion to any ordinary man or woman that a normal child born 360 days after the last intercourse of a man and a woman was the child of that man, and it was to him repugnant that a court of justice should be so little in accord with the common notions of mankind that it should require evidence to displace fantastic suggestions. Both Lord Simonds and Lord MacDermot observed that the difficulty lay in drawing the line. The latter added that a time must come when, with the period far in excess of the normal, the court may properly regard its length as proving the wife's adultery beyond reasonable doubt. If a line has to be drawn, he thought, it should be drawn so as to allow an ample and generous margin, for it may be as difficult for the wife to prove a freak of nature as for anyone else, and that before acting on the length of the period, due regard must be paid to any other relevant evidence.³³

29 *Raspin v Raspin* [1953] 2 All ER 349.

30 *England v England* [1952] 2 All ER 784.

31 *Chandra Mohini v Avinash Prasad* AIR 1967 SC 581; *Jyotish Chandra v Meera Guha* AIR 1970 Cal 266; *Amila v KR Kachha* AIR 2003 Bom 273 (unsupported allegations).

32 *Preston Jones v Preston Jones* [1951] 1 All ER 124, 128, [1951] AC 39; *Vira Reddy v Kistamma* AIR 1969 Mad 235 (402 days); *Maganlal v Bai Dahi* AIR 1971 Guj 33 (313 days). Proof of non-access must be very clear and satisfactory; *Mohindar Kaur v Narindar Singh* AIR 1960 Punj 169.

33 See *Preston Jones* *supra*.

Access and non-access connote, as pointed out by the Privy Council,³⁴ existence and non-existence of opportunities for marital intercourse. These facts can be established not merely by positive evidence of the parties and witness, but also by circumstantial evidence relevant to the issue. It is competent both to the husband and wife to give evidence on the issue. The presumption of legitimacy is, however, highly favoured by law, and it is necessary that proof of non-access must be clear and satisfactory.³⁵ The mere premature birth of a child is not per se a ground of adultery. The attendant circumstances would have to be demonstrated in order to prove adultery.³⁶ It is said that the court will examine the evidence with a lynx eye.

BLOOD-TEST

In a case based on non-access or period of gestation, the court cannot compel any party to submit to a blood test. However, of course, if a party voluntarily tenders such evidence, it would be duly taken into consideration. In England, any such issue is at times combined with the issue relating to paternity.³⁷ There also it is a well-established principle that a person of full age and capacity cannot be ordered to undergo a blood test against his will. Reference may be made to the undermentioned decision of the House of Lords,³⁸ where there are some general observations on blood test, though, of course, courts in India are not concerned with the provisions of the English enactment (Family Law Reform Act 1969), which was being considered in that case relating to paternity of child.³⁹

CONFESSION OF ADULTERY

Confessions or admissions of adultery are admissible in connection with other relevant evidence on a charge of adultery. However, confession or admission of adultery is a species of evidence, which though admissible, is regarded by the court with some distrust and must be examined with jealous scrutiny. There is a canon particularly pointed against it, which says '*nex partium confessione fides habeatur*'. As a general rule, therefore, the court refuses to be satisfied that the charge is established by the mere proof

34 *Karapaya v Mayandi* AIR 1934 PC 49; *Em Parkash v Roshani* AIR 1985 P&H 364; *Parkash Kaur v Harbhajan Das* AIR 2003 P&H 491 (non-access and rude and reckless behaviour).

35 *Venkateswarlu v Venkatanarayana* AIR 1954 SC 176; *Chandramathi v Pazhetti Balan* AIR 1982 Ker 68 (vasectomy operation—success of operation not proved—no case of non-access made out).

36 *Ira Das v Ramesh Mallick* AIR 2003 Ori 62.

37 *F v F* [1986] 1 All ER 242.

38 *W v Official Solicitor* [1970] 3 All ER 107 (HL).

39 Reference may be made to notes to s 12(1)(d).

of such confession or admission, unless it is corroborated by independent evidence. Although it is the general practice in matrimonial cases not to act and grant relief upon an uncorroborated confession or admission of adultery, there is neither absolute rule of practice, nor any rule of law, which prevents the court from acting upon such uncorroborated evidence.⁴⁰ Section 23 of the Act requires that before granting relief the court must be satisfied that the ground for relief is established. What the court will insist upon is that the charge should be strictly proved.⁴¹ In England, in the undermentioned case,⁴² the view was taken by the court of appeal that an adulterer, who gave evidence of his or her own adultery, was in the same position as an accomplice and that the danger of relying on his or her own unsupported evidence was so great that the court should insist upon being satisfied beyond reasonable doubt that the matrimonial offence had been committed, and that it is the duty of the court to direct itself to be slow to act on such evidence in the absence of corroboration. Moreover, even where a confession of adultery made out of court may be taken into consideration against the person making the same; it will not be evidence against any other person implicated by it,⁴³ and if such confession is made in court, its probative value against the other person would be such that the court would be slow to act on it in the absence of cogent and convincing corroborative evidence of adultery by such person.

The true test, where a confession or admission of adultery made by the other spouse is relied upon, would seem to be that the court should be satisfied from all the surrounding circumstances that it is true and there is no collusion. If so satisfied, it is open to the court to grant relief, notwithstanding the absence of independent corroborative testimony.⁴⁴ In such cases, the circumstances themselves may be said to afford that requisite corroboration which is insisted upon not as a matter of legal proof, but by dictates of prudence. Obviously, what circumstance may afford adequate corroboration cannot be listed, and must depend upon factors such as the particular or exceptional nature of the case, the evidence of disposition and opportunity and background of an adulterous association. The court would also take into consideration the circumstances and situation in which the

40 *Over v Over* (1925) 27 Bom LR 251 (admission of adultery by wife in her letters).

41 See notes below s 23.

42 *Galler v Galler* [1954] 1 All ER 536 (the same consideration would apply to the uncorroborated testimony of a corespondent); *White v White and Jerome* (1890) 62 LT 663. Reference may also be made to *Fairman v Fairman* [1949] 1 All ER 938.

43 *Rutherford v Richardson* [1923] AC 167.

44 *Getty v Getty* [1907] P 334; *Simpson v Simpson* (1931) 146 LT 47; *Collins v Collins* (1916) 33 TLR 123 (confession made solely to obtain husband's forgiveness and not for the purpose of bringing about a dissolution of the marriage was acted upon by the court); *Weinberg v Weinberg* (1910) 27 TLR 9; *NC Das v Chinmayee Das* AIR 1982 MP 120 (admission by wife in a letter).

confession is made. Reference may also be made to the general observations made by the Supreme Court in the undermentioned case.⁴⁵

GROUND ALSO FOR JUDICIAL SEPARATION

As now expressly enacted in s 10(1), adultery affords a ground also for judicial separation (on the same facts as for relief by way of a decree for divorce). The legislature had, previously taken the view that a single act of infidelity should be ruled as a ground only for judicial separation and not for divorce. The amending Act, as already pointed out, lays down that even a single act of infidelity can be a ground for either relief.

ONUS AND STANDARD OF PROOF

Before granting relief on the ground of adultery, the court must be satisfied that the matrimonial offence complained of is established.⁴⁶ There is always the presumption of innocence and it is for the petitioner to prove the allegations relied upon. The respondent, on the other hand, bears the burden of establishing affirmative defences set up in reply.

It was sometimes said that since adultery is a serious charge, it must be examined on the same footing as a criminal charge. It was also said at times that it is a quasi-criminal offence and must be proved as such. Section 23 of the Act requires that the court should decree the relief if it is satisfied that the ground for granting relief exists. It is often said that adultery is a serious matrimonial offence and the court must be satisfied beyond all reasonable doubt that it is established. However, s 23 itself lays down a standard and puts adultery on the same footing as cruelty, desertion, or unsoundness of mind. What is required is that the court must be satisfied on a preponderance of probability that the charge is established. A logical conclusion from all points cannot be expected nor can a degree of certainty be demanded of which the matter under investigation is not reasonably capable. The word 'strict' is regarded as sufficiently apt to describe the measure and standard of proof. The proceeding is civil and not criminal and analogy of a criminal case can at times be misleading.

In *White v White*,⁴⁷ the Supreme Court had to consider the words 'satisfied on evidence' used in s 14 of the Divorce Act 1869. After referring to the

⁴⁵ *Mahendra Nanavati v Sushila Nanavati* AIR 1965 SC 364, also see notes under s 23.

⁴⁶ *Bhallabha Das Shab v Sushila Bai* AIR 1988 SC 2089 (allegation of adultery not proved—Supreme Court practice); *Leela v Sachendra* AIR 1994 MP 205 (on the facts voluntary sexual intercourse not established). *Sumita Singh v Raj Bahadur Singh* AIR 1999 All 69 (on facts, adultery proved).

⁴⁷ AIR 1958 SC 441.

case, *Preston Jones*⁴⁸ decided by the House of Lords in England, the Supreme Court expressed the view that the words 'satisfied on evidence' means that the court should be satisfied beyond reasonable doubt as to the commission of the matrimonial offence. The view was also expressed that the evidence must be clear and satisfactory beyond mere balance of probabilities. It was also pointed out that it was not necessary and really possible to prove adultery by any direct evidence.

Reference may also be made to notes under s 23 on 'Standard of Proof; 'Corroboration' and the cases mentioned therein. (Also see 'False Defence' in notes under that section.)

CONDONATION OF ADULTERY

Section 23(1)(b) lays down, in effect, that condonation of adultery is an absolute bar to granting of any relief by way of judicial separation under s 10 or by way of a divorce under s 13(1)(i). The subject of condonation has been considered under s 23.

CLAUSE (I) PRIOR TO AMENDMENT

Under the unamended cl (i) of this section, the legislature had been of the view that a single act of infidelity to the marriage bond, should not be sufficient ground for relief by way of a decree of divorce but should only be a ground for judicial separation as provided in the old s 10(1)(f). The previous cl (i) of the present section required that the offending spouse be 'living in adultery'. The note under the previous clause was as under:

A single act of adultery cannot amount to 'living in adultery' within the meaning of this clause.

The natural meaning of the words would seem to be that they point to a course of action more or less continuous and not isolated acts of immorality. An identical expression is to be found in s 488(4) of the Criminal Procedure Code and has been interpreted to refer to a course of conduct and to mean something more than a single lapse from virtue.⁴⁹

The present tense in the words 'is living in adultery' is significant and the court will refuse to pass a decree if it is satisfied that the respondent was not actually living in adultery, at the time of the petition, even though it may be shown that he or she had in the past formed an adulterous connection. The onus of showing that the respondent had ceased to live in adultery in

⁴⁸ [1951] 1 All ER 124.

⁴⁹ *Re Fulchand* (1928) 30 Bom LR 79; *Kallu v Kausilia* (1904) 26 All 326; *Patala Atchamma v Patala Mahalakshmi* (1907) 30 Mad 332; *Jatindra Mohun v Gouri Bala* (1924) 29 CWN 647; *Chanda v Nandu* AIR 1965 MP 268.

any such case would however, be heavy on the respondent, since the ordinary presumption would be that the guilty respondent shown to have done so had continued to live in adultery.

It would not be enough for the petitioner to show that the respondent had been living in adultery some time in the past and no relief would be granted to the petitioner under the present clause if it appeared that the latter had seceded from such life for an appreciable duration extending to the filing of the petition.⁵⁰ The same view has been taken in the undermentioned cases.⁵¹ As to parties to the application on ground of adultery and the old r 8, reference may be made to the undermentioned case.⁵² Not naming the alleged adulterer in the petition and non-joinder will make the proceedings susceptible to non-maintainability under r 10 of the Hindu Marriage (Punjab) Rules 1956.⁵³ The High Court of Karnataka has held that an adulterer is not a necessary party to proceedings on the ground of adultery, however, an order deleting him as a party is liable to be set aside.⁵⁴

In any such case, if there is no condonation of the adultery, a decree for judicial separation can be granted under s 10(1)(f). In the undermentioned case,⁵⁵ there was proof of only a single act of adultery and a decree for judicial separation was granted, though the petitioner had only claimed dissolution of marriage. Relief by way of judicial separation in any such case, may be granted even at the appellate stage.⁵⁶

CLAUSE (IA): CRUELTY

The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence has not been defined by any statute of the Indian legislature relating to marriage and divorce; nor has the expression been defined in the Matrimonial Causes Act 1950, or any later enactment in England. The danger of any attempt at giving a comprehensive definition that may cover all cases has been emphasised in a number of decisions.⁵⁷ The law on the subject had hitherto been gathered from decided cases and courts in India had accepted and adapted to the conditions in India, the

50 *Rajani v Prabbakar* AIR 1958 Bom 264; *Bhagwan Singh v Amar Kaur* AIR 1962 Punj 144.

51 *Magantlal v Dahi* AIR 1971 Guj 33; *Pattayee Ammal v Manickam* AIR 1967 Mad 254.

52 *G Kondiah v G Ankamma* AIR 1988 AP 68.

53 *Ram Kumar v Raksha* AIR 2003 P&H 334.

54 *Arun Kumar v Radha Arun* AIR 2003 Kant 508.

55 *Bhagwan Singh v Amar Kaur* AIR 1962 Punj 144.

56 *Vira Reddi v Kistamma* AIR 1969 Mad 235.

57 'The categories of cruelty are not closed', per Lord Denning in *Sheldon v Sheldon* [1966] 2 All ER 257.

principles underlying the judge-made law on the subject in England. The accepted legal meaning in England, as also in India, of this expression, which is rather difficult to define, had been 'conduct of such character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger'.⁵⁸

It may be noticed that cruelty per se was not a ground for relief by way of divorce prior to the amendment of this section by the Amending Act of 1976, but was only a ground for the relief of judicial separation under cl (b) of s 10(1) which laid down:

...has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.

The rule laid down in the present cl (ia) does not incorporate those words but simply states 'treated the petitioner with cruelty'. The object, it would seem, was to give a definition exclusive or inclusive, which will amply meet every particular act or conduct and not fail in some circumstances. By the amendment the legislature must, therefore, be understood to have left to the courts to determine on the facts and circumstances of each case whether the conduct amounts to cruelty. This is just as well, since actions of men are so diverse and infinite that it is almost impossible to expect a general definition which could be exhaustive and not fail in some cases. It seems permissible, therefore, to enter a caveat against any judicial attempt in that direction.

The view has been taken in some decisions that the Amending Act of 1976, has simplified the concept of cruelty and there is no reversion to the old English concept but there is a forward march towards liberalisation of the divorce on the ground of cruelty and the statutory limitations in old s 10(1)(b) hence, now been done away with.

In *Dastane v Dastane*,⁵⁹ the Supreme Court critically examined the matrimonial ground of cruelty as it was stated in the old s 10(1)(b) quoted above, and observed that the inquiry in any case covered by that provision had to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for the petitioner to live with the respondent. It was also pointed out that it was not necessary, as under the English law, that the cruelty must be of such a character as to cause danger to life, limb or health,

⁵⁸ *Russell v Russell* [1897] AC 395; *Kallan v Kallan* AIR 1933 Lah 728.

⁵⁹ AIR 1975 SC 1534. Reference may also be made to *Keshavrao v Nisha* AIR 1984 Bom 413 (FB) where it was held that the cruelty contemplated in this section [cl (ia)] is a conduct of such type that the petitioner cannot reasonably be expected to live with the respondent; *Nirmala Jagesha v Manobar Jagesha* AIR 1991 Bom 259 (this decision was subsequently overruled in *A v H* AIR 1993 Bom 70).

or as to give rise to a reasonable apprehension of such a danger though, of course, harm or injury to health, reputation, the working character or the like would be an important consideration in determining whether the conduct of the respondent amounts to cruelty or not. What was required was that the petitioner must prove that the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the respondent.⁶⁰ Cruelty in fact, must obviously depend upon the particular circumstances. The passing of a decree on this ground requires the matrimonial offence to be established so as to conclude that cruelty has resulted into a situation where the spouses can no longer live together. Intention to be cruel is not an essential element of cruelty as envisaged under s 13(ia) of the Hindu Marriage Act, 1955.⁶¹

The material language of the section, it is submitted, has always in these matters to be borne in mind, for if a court is prone to indulge in exposition and attempted definition, there is a risk that there it will be substituted for the language chosen by Parliament with some other form of words and in an attempt at wide survey some essential factor would be omitted. This seems peculiarly applicable to the matrimonial offence of cruelty, cases relating to which are by far the most common of the matrimonial causes contested before the courts. The circumstances vary infinitely from case to case and the modes of life involved at times present sharp contrasts. The following observations of Evershed MR cited with approval by Lord Merriman in *Simpson v Simpson*⁶² should prove to be useful:

It has so often been said that it is obvious—yet it is worth repeating—that all cases that come before this court must be determined on their own particular facts, and I should imagine that in no class of cases is that trite observation truer than in matrimonial cases. The circumstances vary infinitely from case to case. The fact is, I think, another reason for a sense of danger in trying to formulate principles of law out of particular circumstances in particular cases, and then treating those principles of law as being, so to speak, explanations or riders to the actual statutory language.

Though the clause does not in terms state so, it is abundantly clear that the application of the rule must depend on the circumstances of each case. Without attempting to define cruelty it may be said that 'cruelty' contemplated is conduct of such type that the petitioner cannot reasonably be expected to live with the respondent. The treatment accorded to the petitioner must

⁶⁰ *Rajan Ravankar v Shobha* AIR 1995 Bom 246.

⁶¹ *Neelu Kohli v Naveen Kohli* AIR 2004 All 1.

⁶² [1951] 1 All ER 955, 958. As per Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, 583, *Jameson v Jameson* [1952] AC 525, 545, *Cooper v Cooper* [1950] WN 200, 201.

be such as to cause such apprehension in the mind of the petitioner that cohabitation will be so harmful or injurious that she or he cannot reasonably be expected to live with the respondent having regard to the circumstances of each case, keeping always in view the character and condition of the parties, their status, environments and social values, as also the customs and traditions governing them. The apprehension contemplated by the above conception is that further cohabitation will be harmful or injurious and not that the same or similar acts of cruelty will be repeated.

In *Shobha Rani v Madhukar Reddi*,⁶³ the Supreme Court examined the sub-s 13(1)(ia) and stated the proper approach to cases of cruelty and reiterated the legal position abiding after the Amending Act of 1976. In this case (demand of dowry by parents of husband with the support of the husband), it was held that the demand of dowry was prohibited by law and that the totality of the facts and circumstances of the case justified the inference of cruelty. It was also observed that there could be cases where the conduct complained of itself may be 'bad enough and per se unlawful or illegal'. Then the impact or the injurious effect on the other spouse need not be inquired into or considered. In such cases, cruelty will be established, if the conduct itself is proved or admitted.⁶⁴

The judicially accepted legal concept of cruelty in England had for its basis the principles adopted by the ecclesiastical courts in England and it found favour in the House of Lords with the majority of law lords in the leading case of *Russell v Russell*.⁶⁵ An examination of the cases under analogous enactments in England will show that the legal conception has varied and been modified from time to time, though not in theory but in application, with changes in social and economic conditions.

There has been such a marked change in the notions of matrimonial duties and obligations of husband and wife in the present generation in India that it will be incumbent on the court to be extremely careful in the matter of seeking assistance and guidance from decisions arrived at under any previous legislation in India or England, even when the rules may be similarly worded. Blind adherence to any of those decisions must be deprecated, particularly when they relate to persons whose customs, manners and mode of life may be different.

The section lays down that either party to a marriage may file a petition for divorce on the ground of cruel treatment by the other spouse. It is not necessary that the act or acts complained of must take place within what is sometimes described as 'the ambit of the marital relationship'. It may well be that the acts may occur after the husband and wife have begun living apart.⁶⁶

63 AIR 1988 SC 121; *Krishna Bannarje v Bhanu Bikash* AIR 2001 Cal 154.

64 *Shobha Rani v Madhukar Reddy* AIR 1988 SC 121.

65 *Russell v Russell* [1897] AC 395; *Kallan v Kallan* AIR 1933 Lah 728.

66 *Meacher v Meacher* [1946] P 216, [1946] 2 All ER 307; *Jamieson v Jamieson* [1952] AC 525, 546-47.

It is conceivable that revelation after marriage of fraudulent deception before it, may be so distressing and shocking as to amount to cruelty.⁶⁷ Moreover, having regard to the facts and circumstances of a case, the court may take into consideration, conduct of a spouse even subsequent to the suit, but it should be extremely slow in doing so.

What is cruel treatment must to a large extent be a question of fact or a mixed question of law and fact and no dogmatic answer can be expected to the variety of problems that must continue to arise before the court in these sort of cases. The law has no standard by which to measure the nature and degree of cruel treatment that may satisfy the test. Physique, temperament, standard of living and culture of the spouses and the interaction between them in their daily life and all other relevant circumstances must have a bearing on the question whether the acts or conduct complained of amount to the matrimonial offence which entitles a spouse to relief under this clause. The conduct alleged must be judged upto a point by reference to the victim's capacity or incapacity for endurance, insofar as that is or ought to be known to the offending spouse.⁶⁸ It is also necessary to weigh all the incidents and quarrels between the parties, keeping in view the impact of the personality and conduct of one spouse upon the mind of the other.⁶⁹

The language of the clause is comprehensive enough to include cases of physical as also mental cruelty and cases where both the elements are present. Where physical violence is proved, the matter may not present any particular difficulty. Even a single act of violence may by itself be of such a grievous and inexcusable nature as to satisfy the test of cruelty. On the other hand, isolated acts of assaults committed on the spur of the moment and on some real or fancied provocation may not amount to cruel treatment. The assault or assaults must not be viewed as isolated facts but in the proper setting, as an incident or incidents in a complicated series of marital

67 Reference may be made to *Cade v Cade* [1957] 1 All ER 609.

68 Much depends in each case upon its circumstances and in particular upon the victim's capacity for endurance: *Mackenzie v Mackenzie* [1895] AC 384, 405; see AIR 1951 SC 286, 294; *Gollins v Gollins* [1962] 3 All ER 897.

69 *King v King* [1953] AC 124, 130; *N Sreepadachar v Vasantha Bai* AIR 1970 Mys 232; *PL Sayal v Sarla Rani* AIR 1961 Punj 125 (administering 'love-potion' to husband and husband suffering in health); *Kaushalya v Wisakhi Ram* AIR 1961 Punj 521 (beating); *Iqbal Kaur v Pritam Singh* AIR 1963 Punj 242 (unwarranted allegation of immorality by husband); *Janri Bai v Chittar* AIR 1966 MP 205; *Pitul Devi v Gopi Mandal* AIR 1963 Pat 93. Of course, these accusations must be considered along with all the other circumstances of the case. *Sukumar Mukherjee v Tripti* AIR 1992 Pat 32 (relying upon *Shobha Rani v Madhukar*) (misbehaviour not proved); *Krishna Bannarjee v Bhanu Bikash* AIR 2001 Cal 154 (physical cruelty, kleptomania decree granted); *Kameswara Rao v Jabilli* AIR 2002 SC 576 (mental cruelty married life unhappy); *Meera v Ramesh Chand* AIR 2004 Raj 193 (evidence of cruel behaviour, long separation).

relations. It would be relevant to have regard to any physical or mental strain under which the accused spouse may have been labouring. Difficulty sometimes may arise where the question is whether a number of minor acts of physical violence alleged are sufficient to amount to legal cruelty. This can only be determined by keeping in view the physical and mental condition of the parties, their age, environments, standard of culture and status in life.⁷⁰ Allowance in judging the language or conduct used by one spouse to another must be made for local and social habits. The principal is well-established that cruelty might be inferred from the whole facts and matrimonial relations of the parties and atmosphere disclosed by evidence. The acts alleged must be considered not separately but together. It would be a wrong approach to put the various acts or conduct alleged into a series of separate compartments and say of each of them that by themselves they cannot pass the test of cruelty and, therefore, that the totality cannot pass the test of cruelty. A single act of physical violence, though as a rule not sufficient of itself to meet the test, may when considered with other minor acts constitute cruelty. The picture of the domestic life of the spouses must be surveyed as a whole before any judgment can be formed of their possible future relations and the reasonableness or otherwise of the apprehension in the mind of the petitioner.

MENTAL CRUELTY

The clause is comprehensive enough to apply to cases of mental cruelty. It was formerly thought that actual physical harm or reasonable apprehension of it was the prime ingredient of this matrimonial offence. That doctrine is now repudiated and the modern view has been that mental cruelty can cause even more grievous injury and create in the mind of the injured spouse reasonable apprehension that it will be harmful or unsafe to live with the other party. The principle that cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence, is of greater cogency in cases falling under the head of mental cruelty. Thus, mental cruelty has to be established from the facts.⁷¹ In case of physical cruelty, there may exist tangible evidence, clearly indicating cruel behaviour, as against cases of mental cruelty, where there may not be any direct evidence. In such cases, the court is required to delve into the mental process and the effect of such incidents and instances that may be brought out in evidence.

When the whole conduct of the spouse shows instances of ill-treatment, use of abusive language and allegations which amount to casting aspersions on the fidelity of the other spouse and in general have the effect of demoralising

⁷⁰ *Kameswara Rao v Jabilli* AIR 2002 SC 576.

⁷¹ *Babu Ram v Kanta Devi* AIR 1990 J&K 1.

the spouse, against whom the allegations are levelled, causing mental stress and agony, mental cruelty would be proved.⁷²

SOME BROAD GENERAL PRINCIPLES

A large volume of case law had grown around the significance of what is sometimes termed 'legal cruelty' and as has already been pointed out, facts and circumstances vary infinitely and so do various other factors which present relevant considerations of vital importance so much so that acts which may be said to amount to cruelty in one case may not be sufficient to fulfil the requisite test in another case. Comparison of facts, therefore, of cases which may present a similarity, is one danger always to be borne in mind. The court will not try to match the colour of the facts of one case with that of another, nor will it tag on any specific test of general application; though of course, the conceptions approved of by the High Court and particularly the Supreme Court continue to be of considerable guidance in these matters. Some broad general principles, which emerge from the decided cases should be found useful:

- (i) Cruelty may be inferred from the whole facts and matrimonial relations of the parties and interaction in their daily life disclosed by the evidence. The question whether the respondent treated the petitioner with cruelty is a single question only to be answered after all the facts have been taken into account. Without quoting the specific opinions on which this principle was stated by at least two of the Lords who decided the case of *Jamieson v Jamieson* in the House of Lords,⁷³ this principle may now be said to be well-established. It may be taken as equally well-established that it is a wrong approach to put the various acts or conduct alleged, into a series of separate compartments and say of each of them that by themselves cannot pass the test of cruelty and, therefore, that the totality cannot pass that test.
- (ii) It is undesirable, if not impossible, to create categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances amounting to mental cruelty.⁷⁴ Nor is it necessary to compare acts as being gross and not gross. There may be cases where the acts complained of are in themselves so trivial that the court would be justified in not attaching any importance to them. On the other hand, acts not serious in themselves may be symptomatic of the pass to which the marriage

⁷² *A Jayachandra v Anel Kaur* (2004) 10 SCALE 153.

⁷³ *Jamieson v Jamieson* [1952] AC 525, 550.

⁷⁴ Per Lord Normand in *Jamieson v Jamieson* ibid 545.

had come and of the state of mind of the parties. Since cruelty is to be inferred from the whole relations between the husband and wife it would not be a proper approach 'to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage in the present context is not to be taken as just the sum of a number of incidents.'

- (iii) In general, cruelty is in its character a cumulative charge. It is not necessary that the acts complained of must be of a certain character. The conduct may consist of a number of acts each of which is serious in itself, but it may well be even more effective if it consists of a long continued series of minor acts, no one of which could be regarded as serious if taken in isolation. Every such act must be judged in relation to its attendant circumstances; and the physical or mental condition or susceptibilities of the innocent spouse and the offender's knowledge of the actual or probable effect of his conduct on the other. The age, environments, standard of culture and status in life of the parties are also matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. The acts and incidents complained of, as also the conduct of the parties, must be taken together to form a composite picture from which alone it can be ascertained whether the acts of one spouse on another should, judged in relation to all the surrounding circumstances, be found to amount to cruelty.
- (iv) The existence of cruelty depends not merely on the magnitude, but at times also on the consequence of the offence, actual or apprehended.
- (v) Mental ill-treatment may be coupled with physical ill-treatment, so as to found a charge of cruel treatment. Since mental and physical ill-treatment can, though they are not *ejusdem generis*, be taken together, it must follow that different forms of ill-treatment may be taken together to found a charge of treatment which amounts to cruelty.⁷⁵
- (vi) The primary question in these cases is not a question of whether the conduct complained of would be cruel to a reasonable person. The court has to deal not with an ideal husband or ideal wife but with 'this man and this woman'. Nor is the court concerned with the reasonable person. The court will not start with any *a priori* assumptions that the parties are reasonable people.⁷⁶

⁷⁵ This principle is derived from *Cooper v Cooper* [1954] 3 All ER 415; *Gopal Krishan v Mithilesh Kumari* AIR 1979 All 316 (conduct of mother-in-law, husband passive observer); *Pramila Bhatia v Vijay Kumar Bhatia* AIR 2000 Raj 362 (physical abuse through wife's brother & other circumstances).

⁷⁶ *Dastane v Dastane* AIR 1975 SC 1534, 1541.

- (vii) The assertions or admissions of a party to the divorce proceedings should not be ignored by the court.⁷⁷ Such admissions or assertions must however be weighed by the court with the evidence adduced.

INTENTION

Actual intention on the part of one spouse to injure the other is not an essential factor. In a passage which has become *locus classicus*, it was observed:

It is not necessary in determining this point, to inquire from what motive such treatment proceeds. It may be from turbulent passion, or sometimes from causes, which are not inconsistent with affection, and are indeed often consistent with it, as the passion of jealousy. If bitter waters are flowing, it is not necessary to inquire from what source they spring.⁷⁸

In *Jamieson v Jamieson*,⁷⁹ Lord Merriman reviewed the law on the subject and pointed out that actual intention to injure was not an essential factor, and that intentional acts may amount to cruelty even though there was no intention of being cruel. Motive, malignity or malevolent intention, it is well-recognised,⁸⁰ are not essential ingredients but where they exist, they would be factors of considerable importance,⁸¹ for facts done with malevolence are likely to bear fruit in acts of a serious and grave nature. In a doubtful case actual intention to hurt may even be of decisive importance.⁸² Where there is proof of a deliberate course of conduct on the part of one intended to hurt and humiliate the other spouse, persistence in cruelty can easily be inferred. Studied neglect or a course of degradation may well prove more deleterious in the circumstances of a case. As pointed out by Lord Reid, in the case mentioned above,⁸³ there could hardly be a more grave matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding and humiliating the other spouse. Where such course of conduct is shown, it is no answer that there was no actual intention to treat the other spouse with cruelty. In *Gollins v Gollins*, the House of Lords⁸⁴ overruled some earlier decisions of the courts in

77 *Sobha Badigar v Srinivas Badigar*, AIR 2002 Kant 256 (grant of divorce by ignoring assertions improper).

78 *Holden v Holden* (1810) 1 Hag Con 453, 458.

79 [1952] AC 525, 540–41; *Squire v Squire* [1949] P 51.

80 *Squire v Squire* [1949] P 51.

81 Per Lord Reid in *King v King* [1953] AC 124, 145.

82 Per Lord Normand in *Jamieson v Jamieson* [1952] AC 525.

83 *Jamieson v Jamieson* supra (conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference).

84 [1964] AC 644, [1963] 2 All ER 966.

England and laid down that neither actual nor presumed intention to hurt the other spouse was a necessary element in cruelty.

It was held, in the case referred to above, that if the conduct complained of and its consequences were so bad that the complaining spouse must have a remedy, then it did not matter what was the state of mind of the offending spouse. The question which the court asks itself is—whether this conduct by this man, to this woman or vice versa is cruelty.⁸⁵ Marital discord is not dependent upon the number of incidents or relentless course of events but must be judged from the impact and gravity of the conduct complained of.⁸⁶

While there is no such requirement that intention to hurt must be shown, much must depend on the knowledge and intention of the offending spouse, on the nature of his (or her) conduct and on the character and physical or mental condition and weaknesses of the spouses, and no general statement can be expected. The treatment complained of must, in the ultimate test, be such as to cause a reasonable apprehension in the mind of the complaining spouse that it will be harmful or injurious for him or her to live with the other spouse. In the undermentioned case, a Full Bench of the High Court of Jammu and Kashmir has expressed the view that having regard to the facts of that case, intention was a necessary element and that the petitioner had failed to establish the same.⁸⁷

CLAUSE (IA) ‘...TREATED...WITH CRUELTY’

The clause requires that to establish cruelty the offending spouse must have ‘treated’ the petitioner with cruelty and the court has to ascertain whether or not there was anything which can be described as treatment or conduct of the nature discussed above. There are no limits to the kind of treatment or conduct that might constitute cruelty. It may consist of a display of temperament, emotion or perversion, whereby one gives vent to his or her feelings, without intending to injure the other. It need not consist of direct action against the other but may be misconduct indirectly affecting the other spouse even though it is not aimed at that spouse. Such for instance, would be cases of sexual offences directly relevant to the husband’s conjugal obligations or indecent assault on a child. The question in all such cases of ill-treatment is whether one party to the marriage has treated the other with cruelty, according to the ordinary sense of that word, rather than whether

⁸⁵ Ibid; *Lauder v Lauder* [1949] 1 All ER 76 (CA).

⁸⁶ *Vijaykumar Bhate v Neela Bhate* AIR 2003 SC 2462.

⁸⁷ *Jai Lal v Sala Devi* AIR 1978 J&K 69 (wife suffering from a disease in her nose which could be cured by a minor surgery—awful smell alleged); *Rup Lal v Kartar Devi* AIR 1970 J&K 158; *Bhagwat v Bhagwat* AIR 1967 Bom 80 (intention not always necessary).

the party charged was himself or herself a cruel man or woman. In doing so, as observed by Lord Evershed in *Williams v Williams*,⁸⁸ the court would apply the common sense of the English language and the ordinary standard of human conduct. After the decision of the House of Lords in *Gollins v Gollins*⁸⁹ in England, the test for establishment of cruelty is regarded there to be, that the conduct complained of must be sufficiently 'grave and weighty' or 'grave and substantial' to warrant the description of being cruel. The question which the court would ultimately put to itself after considering the sum total of the reprehensible conduct complained of would be—'whether this conduct by this man to this woman or vice versa is cruelty'.

Merely showing that the parties are unhappy because of unruly temper⁹⁰ of a spouse or matrimonial wrangling, would fall considerably short of the conduct which can amount to cruel treatment. Nor would it be sufficient to show that the other spouse is moody, whimsical, exacting, inconsiderate and irascible. Incompatibility of temperament, mere neglect and want of affection, disavowal of love, wounding of the feeling or even expression of hatred and the like would not be regarded as of themselves cogent grounds for relief; nor would meanness, stinginess, shiftlessness or selfishness afford grounds for relief. Defects of temperament like defects of health, must ordinarily be accepted for better or for worse. The acts complained of may be of a minor nature and continued for a short time. They may be due to circumstances of the moment. To amount to cruelty, the acts must be of a more serious nature than mere wear and tear of married life. As observed by the Supreme Court,⁹¹ sometimes the temperaments of the parties may not be conducive to each other, which may result in petty quarrels and troubles. There is a difference between the ordinary wear and tear of married life and cruelty, and when the disputes between the parties are not attributable to cruelty, no divorce can be granted.⁹²

Nor would mere vulgar or obscene abuse, rudeness of language, opprobrious and offensive remarks, petulance of manners, austerity of temper, or an occasional sally of passion or acts of ill-treatment per se constitute legal cruelty. The court has to take into account the ordinary weakness, failings and shortcomings, as well as strengths of human nature.

88 *William v William* [1963] 2 All ER 994 (HL).

89 [1964] AC 644, [1963] 2 All ER 966.

90 *Dey v Dey* AIR 1973 Cal 393; *Indira Gangele v Shailendra* AIR 1993 MP 54 (unruly temper or whimsical nature, not cruelty).

91 *JL Nanda v L Nanda* AIR 1988 SC 407; *Indira Gangele v Shailendra* AIR 1993 MP 54 (wife staying at paternal residence on ground of studies and refusal to attend marriage of sister-in-law, does not amount to cruelty); *Vinlesh v Prakash Chand Sharma* AIR 1992 All 260 (one isolated instance would not amount to cruelty); *Rajani Chakraborty v Anjali* AIR 1993 Cal 10; *Popuri Smita Lakshmi v Smita* AIR 2004 AP 187 (unsubstantial allegations, no decree.)

92 *Savitri Pandey v Prem Chandra Pandey* AIR 2002 SC 591.

Although there may be unhappiness in a marriage, the court cannot for that cause alone, find cruelty. In matrimonial causes, the courts have repeatedly said that if by this inactivity of the court, injustice may be suffered, and misery produced, the answer is that the courts of justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further; they cannot make men virtuous; and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

Though, as stated earlier, cruelty has to be proved, if the allegations of irregular behaviour are such that the complaining spouse could not be expected to live with the other due to such peculiarities, and the evidence, though not controverted, is convincing enough, the court may grant relief if the allegations are sufficient to constitute legal cruelty.⁹³

There are a number of decisions of courts in England which on examination will be found to turn on their own peculiar facts and situations and it is submitted that they need not readily be pitchforked in the case of persons whose mode of living may be totally different. However, the broad general principles reiterated by the courts in England in the decisions to which reference has already been made, should prove useful as they afford guidance on the question of cruelty where the border line—border of cruelty—is at times, extremely difficulty to trace.

Unwarrantable indifference to the victim's health, callous neglect, extreme boorishness, deliberate refusal to co-operate and calculated harassment in matters touching the household and children of the marriage and any ill-treatment of a grave and serious character, may be elements which would go far to entitle the injured spouse to relief when the cumulative effect of the conduct viewed as a whole brings the case very near the line, where there would be reasonable apprehension that cohabitation would be harmful. What constitutes cruelty in the background of the facts is a matter of drawing inference.⁹⁴

In the ultimate analysis, the conclusion must depend on the broad principles to which attention has already been drawn and the facts and circumstances of each case.⁹⁵

93 *Uma Wanti v Arjan Dev* AIR 1995 P&H 312.

94 *Praveen Mehta v Indrajit Mehta* AIR 2002 SC 2582; *Neelam Kumari v Gurnam Singh* AIR 2004 P&H 9 (insulting behaviour, loose character, refusal to perform marital obligations)

95 *Gurcharan Singh v Sukhdeo Kaur* AIR 1979 P&H 98 (wife leaving husband and a child two months old—refusal to return); *Aloka De v Mrinal Kanti De* AIR 1973 Cal 393 (wife's uncontrollable temper but contributed by the husband);

continued on the next page

As already noticed above, the difficulty in this sort of case is to determine on which side of the border of cruelty, the facts lie. It has for instance, been held that though mere refusal of sexual intercourse is not per se cruelty⁹⁶ for a man deliberately and without good reason permanently to deny to a wife, who has a normally developed maternal instinct, a fair opportunity of having a single child can in itself be cruelty, and when the husband adopts a course of conduct which preserves to himself a measure of sexual enjoyment. Similarly, if a wife deliberately and consistently refuses to satisfy her husband's natural and legitimate craving to have children, the wife would be guilty of cruelty.⁹⁷ It would, however, be impossible to lay down any rule of law or to generalise on whether refusal of intercourse constitutes cruelty; each case must be looked at in the light of its own facts.⁹⁸ Similar considerations would apply to cases arising under the Act. In such case the court, it is submitted, should attach due weightage to the general principles underlying the Hindu law of marriage and sonship and the importance attached by Hindus to the principle of spiritual benefit of having a son who can offer funeral cake and libations of water to the manes of his ancestors and it would be no answer to say that it is now open to the other spouse to adopt a child.

Demands which are known to be regarded by the other spouse as inordinate or revolting may, if persisted in, be a grave and weighty consideration and there may come a point of time at which persistent lack of consideration in matters of this sort may lead to a reasonable inference of cruelty.⁹⁹ Sexual malpractices in circumstances which create reasonable

Minakshi v Biresb Ranjan AIR 1987 Gau 90 (also Re condonation); *Rajinder v Anita* AIR 1993 Del 135; *Yashoda v Krishnamoorthy* AIR 1992 Kant 308 (domestic quarrel cannot be characterised as cruelty); *Harish Kumar v Anita* AIR 2003 MP 197 (no pleadings of cruelty, no decree can be passed).

96 *Weatherley v Weatherley* [1947] 1 All ER 563; *Knott v Knott* [1955] 2 All ER 305, [1955] P 249 (case of *coitus interruptus*); *Cackett v Cackett* [1950] 1 All ER 677, [1950] P 253. However, mere abstention by the husband from intercourse has been held in any case to amount to cruelty; *Walsham v Walsham* [1949] P 350, [1949] 1 All ER 774; *P v P* [1964] 3 All ER 919; *Bravery v Bravery* [1954] 3 All ER 59 (husband got sterilisation operation performed on himself after the birth of one child, this was held not to amount to cruelty; also see under 'separation').

97 *Forbes v Forbes* [1955] 2 All ER 311; *Fowler v Fowler* (1952) 2 TLR 143 (distinguished in this case); *Knott v Knott* [1955] 2 All ER 305.

98 *Sheldon v Sheldon* [1966] 2 All ER 257; *P (D) v P (J)* [1965] 2 All ER 456 (refusal due to psychological fear of conception over which wife had no control—held cruelty); *Evans v Evans* [1965] 2 All ER 789 (adverse effect on husband's health); *B (L) v B (R)* [1965] 3 All ER 263 (CA) (held on the facts that there was no cruelty); *Nijhawan v Nijhawan* AIR 1973 Del 200 (held there was cruelty); *Srikant v Amraddha* AIR 1980 Kant 8; *Anil Bhardwaj v Nirmlesh Bhardwaj* AIR 1987 Del 111; *Vimlesh v Prakash Chand Sharma* AIR 1992 All 260 (letter by wife to her relations—on facts no cruelty disclosed).

99 *Holborn v Holborn* [1947] 1 All ER 32. As to sexual malpractices, see the cases in the footnote below.

apprehension of the nature indicated above may amount to cruelty.¹ A husband who, knowing that he is suffering from venereal disease, insists, against the will of his wife who knows of his condition, in having marital intercourse with her, may be guilty of legal cruelty. A persistent course of dishonesty and criminal convictions which create such reasonable apprehension to the other spouse may well amount to cruelty.² When the wife was willing to live with the husband only on cessation of the husband's illicit relations with another woman, the wife would not be guilty of cruelty.³

Drunkenness, per se, is not cruelty, but persistent drunkenness after warnings that such a course of conduct is inflicting pain and misery on the other spouse may well amount to cruelty. Such drunkenness, if it is combined with other acts of ill treatment, as it usually is, may obviously be a factor of great importance.⁴

As a general rule words of menace or threats would not be regarded as by themselves sufficient to cause such reasonable apprehension when there is no attempt to carry out the threat; but threats of physical violence may be of such a character as would afford reasonable ground to apprehend that they will be carried into effect and render cohabitation unsafe. Continued cohabitation coupled with stale allegations mitigate against grant of relief under the section.⁵ While the court would be slow in accepting and acting on a mere outburst of threatening language or wild expressions uttered by a person of ungovernable temper, it would not wait for any serious threat to be carried into effect if, considering the marital relations of the parties and their conduct and character, it appears that it is such as to cause in the mind of the complaining spouse such reasonable apprehension. Reference may be made to the decision of the Supreme Court in *Dastane v Dastane*.⁶ Though the court will not give any relief in case merely of 'trifling acts', it may in the circumstances of the case take notice of the cumulative effect of such acts and give relief.

Unfounded accusations of infidelity by one spouse against another may not be regarded as by themselves amounting to cruelty.⁷ These at times proceed from turbulent passions or passions of jealousy. The general rule

1 *Statham v Statham* [1929] P 131; *Lawson v Lawson* [1955] 1 All ER 341 (standard of proof required in case of sodomy); *Gardner v Gardner* [1947] 1 All ER 630 (unnatural sexual relations by wife with another woman).

2 *Stanwich v Stanwich* [1970] 3 All ER 983.

3 *Madan v Chitra* AIR 1993 Cal 33.

4 *Baker v Baker* [1955] 3 All ER 193; *Harjit Kaur v Roop Lal* AIR 2004 P&H 22 (drunkenness per se not cruelty)

5 *Nalini Sunder v GV Sunder* AIR 2003 Kant 86.

6 AIR 1975 SC 1534.

7 *Augustin v Augustin* (1882) 4 All 374; *Niblett v Niblett* AIR 1935 Oudh 133, 136; *Siddagangiah v Lakshamma* AIR 1968 Mys 115 (defence to a suit for restitution of conjugal rights). See cases in footnotes below; *G Siddagananganppa v R Shailaja* AIR 2004 Kant 244 (unproved allegations of illicit relations).

in a matrimonial cause that the whole of the relations between the parties and all the relevant circumstances must be considered is of special value when cruelty consists, not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Wilful accusations of adultery may be made which are not true and for which there are no probable grounds, and yet they may not amount to cruelty—for example they may have been provoked by the cruel conduct of the other spouse.⁸ Malicious charges of adultery persistently made in bad faith may warrant relief if in the light of the whole facts of the case the court is satisfied that there was such reasonable apprehension.⁹ So also, false accusations by a husband against the wife that she had entered into a second marriage and was living in adultery can amount to cruelty.¹⁰ Non-disclosure of her true age and marital status by the wife and leaving the husband's house as well as lodging of criminal prosecution against each other have been held to be amounting to cruelty and a divorce was decreed.¹¹ Unfounded allegations, for instance, demand of dowry or threats of disfiguring the wife may in the facts of a case amount to mental cruelty.¹² So also, a complaint by the wife under s 498 A of the Indian Penal Code found to be false, could amount to cruelty.¹³ Similar considerations would apply to the case of false and malicious accusations of any serious crime. Misbehaviour and non-cooperation with a spouse and the act of leaving the matrimonial home would in the given facts, amount to cruelty.¹⁴ The criterion to be applied in all such cases is not the effect produced in the minds of others but their consequence, actual or apprehended, on the complaining spouse. A petition for restitution of conjugal rights was filed by the husband when the wife left the matrimonial home. The wife alleged that the husband had illicit relation with other women, such unsubstantiated allegations were held amounting to cruelty and character

8 *King v King* [1953] AC 124, [1953] 2 All ER 595.

9 *Jeapes v Jeapes* (1903) 89 LT 74; *Kamla Devi v Amar Nath* AIR 1961 J&K 33; *Kobli v Kobli* AIR 1967 Punj 397; *Kusum Lata v Kamta Prasad* AIR 1965 All 280; *Umri Bai v Chittar* AIR 1966 MP 205; *Om Pati v Rajvir* AIR 2004 P&H 171 (reckless allegations would amount to cruelty).

10 *Mobinder Kaur v Bhag Ram* AIR 1979 P&H 71; *Ashokkumar v Vijay Laxmi* AIR 1992 Del 182 (false accusations in written statement, on the facts, held to be amounting to cruelty); *Bhagat v D Bhagat* AIR 1992 Del 26 (allegations of lunacy and insanity have to be proved for grant of relief); *Pushpa Mishra v Archana* AIR 1992 MP 260; *Shivani Chattopadhyay v Siddharth* AIR 2002 P&H 22 (unsubstantiated allegations of infidelity, insulting language); *DN Sharma v Usha Sharma* AIR 2004 Del 198 (grave allegations and physical abuse).

11 *Raj Kumari v Nandlal* AIR 2002, Raj 345.

12 *MK Malhotra v Kirti Malhotra* AIR 1987 Del 266; *Rajinder v Anita* AIR 1993 Del 135 (filing false complaint against husband, not allowing consummation of marriage and abusing in law amounts to cruelty); *Rakesh Sharma v Surbhi Sharma* AIR 2002 Raj 138 (mental cruelty and desertion by wife—divorce decreed).

13 *Narendra Kumar v Indu* AIR 2002 Raj 169.

14 *Praveen Mehta v Indrajit Mehta* AIR 2002 SC 2582.

assassination and a divorce was granted.¹⁵ When on a petition for restitution of conjugal rights, a decree was passed but the spouse persisted in her allegations of dowry harassment, which had been proved as false before a criminal court, the husband having developed an aversion in living with the wife due to such conduct, could not be classified as a wrong and he was held entitled to a divorce.¹⁶ Threat or attempt to commit suicide by a spouse can, in the totality of the circumstances of a case, amount to cruelty.¹⁷ The entering into of a second marriage by the husband has also been construed to be cruelty, entitling the wife to a divorce,¹⁸ though, of course, the wife is entitled to other reliefs under the law. However, a petition for divorce presented by the husband after a long period of marital life on grounds of cruelty was liable to be dismissed when the wife proved that the husband was living in adultery and had issues from such union.¹⁹ Derogatory and disparaging remarks against spouse and close relatives in the written statement, allegations of illicit sexual relations and sexual perversity will amount to cruelty.²⁰ Such allegations of an extreme nature in a written statement, showing grave character assassination, would satisfy the requirements of cruel behaviour.²¹ Where however, the husband had an illicit affair and the wife objected to it, the husband would not be entitled to a divorce on the ground of cruelty.²² When allegations by one spouse are provoked by the other, they could not provide a ground for divorce.²³ If one of the spouses makes allegations in proceedings pending in the court, it would amount to mental cruelty, on facts and the other spouse would, as such, be entitled to a divorce.²⁴ (See also discussion on 'liberal construction'.) The *mangalsutra* is considered as a holy thread and the sign of a lady being married. It is a symbol of matrimony. According to Hindu *shastras* a wife removes the *mangalsutra* only after the demise of her husband. The removal

15 *Kakali Das v Ashish Kumar Das* AIR 2004 Cal 176.

16 *D Parthasarthy v Vinayaprabha* AIR 2004 Kant 348.

17 *Savithri v Mulchand* AIR 1987 Del 52; *Shakuntala v Om Parkash* AIR 1981 Del 53; *Nirmala Jagesha v Manohar Jagesha* AIR 1991 Bom 259 (irresponsible and wild allegations of impotency, decision was overruled in *A v H* AIR 1993 Bom 70); *Meera v Vijay* AIR 1994 Raj 33; *Rama Kanta v Mohinder* AIR 1996 P&H 98; *Dastane v Dastane* AIR 1975 SC 1534.

18 *Suneer Sharma v Madhurlata* AIR 2000 MP 26; *Germanthangi v F Rokunga* AIR 2004 Gau 42 (residing with another woman, abandonment).

19 *Ram Lakhan v Prem Kumari* AIR 2003 Raj 115.

20 *Santana Banerjee v Sachindra Nath Banerjee* AIR 1990 Cal 367; *Vibha Srivastava v Dinesh* AIR 1991 MP 346; *Surbhi Agarwal v Sanjay Agarwal* AIR 2000 MP 139; *Suneer Sharma v Madhurlata* AIR 2000 MP 26; *Meenakshi Mehta v Atul Mehta* AIR 2000 HP 73; *Jai Dayal v Shankuntla Devi* AIR 2004 Del 39 (humiliation and disgusting allegations amount to cruelty).

21 *Vijaykumar Bhate v Neela Bhate* AIR 2003 SC 2462.

22 *KR Manjunath v Veena* AIR 1999 Kant 64.

23 *Kakali Das v Ashish Das* AIR 2003 Cal 287.

24 *V Bhagat v D Bhagat* AIR 1994 SC 710.

of the *mangalsutra*, by the wife, during the lifetime of the husband, cannot, however constitute cruelty, when it is found on evidence, that it is the husband who had instigated the wife to remove it. The husband cannot take advantage of his own action in asking the wife to remove the *mangalsutra*. This cannot constitute grounds of cruelty.²⁵ Allegations of cruelty have to be proved before a decree can be passed.²⁶ A decree of divorce cannot be granted on unsubstantiated facts.²⁷ Proof as regards cruelty by the wife and failure of the husband to dislodge such facts could result in grant of divorce.²⁸ The wrongful conduct of a spouse cannot be made the basis of any relief against the other spouse as this would go against the basic tenet of a person not being entitled to the benefit of his or her own wrong.²⁹ If a petition for divorce is found to be actuated with oblique motives so as to create defences to proceedings of criminal breach of trust and dowry harassment, and also to avoid maintenance granted under s 125 of the Code of Criminal Procedure, the dismissal of the divorce proceedings would, on the facts be appropriate.³⁰

DOWRY

Reference has already been made to the decision of the Supreme Court in *Shoba Rani v Madhukar Reddi*³¹ where it has been held that demand for dowry—by parents of husband with support of the husband—can in the circumstances and facts of the case, amount to cruelty within the ambit of the expression ‘treated’.

JUSTIFICATION AND EXCUSE

Provocation or self-defence may be pleaded in justification or by way of excuse for the act or conduct complained of on the ground of cruelty. It is well-established that relief on this ground may be denied where the misconduct is provoked or may be justified or is excusable. The provocation must, however, be extreme³² and cruelty wholly disproportionate to the provocation would not be treated as excusable.

25 *S Hanumantha Rao v Ramini* AIR 1999 SC 1318.

26 *Naval Kishore Somani v Poonam Somani* AIR 1999 AP 1.

27 *Premchand Pandey v Savitri Pandey* AIR 1999 All 43; *Deepika v Nareshchandra Singhania* AIR 2000 All 149 (no evidence by husband, relatives not examined); *Mirapala Venkata Ramana v Mirapala Peddaraju* AIR 2000 AP 328; *Swati Solunke v Ravindra Solunke* AIR 2000 Bom 297.

28 *Piyush Rastogi v Archana Varshney* AIR 2001 All 2.

29 *Kamladevi v Shivakumar Swamy* AIR 2003 Kant 36.

30 *Balbir Singh v Bholi* AIR 2003 P&H 349.

31 AIR 1988 SC 121; *Prakash Kaur v Harjindal Pal* AIR 1999 Raj 46.

32 *Meacher v Meacher* [1946] 2 All ER 307, [1946] P 216, *Stuck v Stuck* [1967] All ER 323.

INSANITY

In *Williams v Williams*,³³ the House of Lords after review of the decisions on the subject held that the fact the husband did not know that his acts were wrong did not of itself constitute a defence to the allegations of cruelty. The view succinctly stated that there is insanity of a respondent spouse (in the sense that he or she, owing to disease of the mind, was unaware of the nature and quality of his or her acts, or if aware of that, did not know the act to be wrong) is not necessarily a defence to the ground that the respondent treated the petitioning spouse with cruelty; but insanity is a factor to be taken into account in applying the test (which nevertheless remains an objective test), whether in all circumstances of the case the respondent's conduct is of such gravity that he has by his acts treated the petitioner with cruelty. Thus for instance, if the conduct were such that it would amount to cruelty only if aggravated by intention to hurt, a spouse who could not form such an intention would not be held to have treated the other spouse with cruelty.

The question whether insanity is a defence to a charge of cruelty and if so to what extent has been debated in a number of cases in England and there was diversity of judicial opinion on what has been felt to be a 'difficult question'. According to one view, it would be a contradiction in terms to describe as cruel the conduct of a person who did not know what he was doing. The word 'cruel' carries with it implications of guilt which can no more be imputed to such a person than to a sleep-walker.³⁴ The other view was that in petitions based on cruelty by the husband the duty of the court to interfere was intended, not to punish the husband for the past, but to protect the wife for the future, and to withdraw from consideration intolerable conduct which due to insanity would render the court powerless in cases where help was most needed and therefore, the defence of insanity should not be open to the husband in any such case.³⁵

As to abnormality³⁶ and uncontrollable impulse,³⁷ reference may be made to the undermentioned cases.

SCHIZOPHRENIA: SERIOUS DISEASES

It would be unreal to strain the meaning of the word 'cruelty' to comprehend what can only be described as the schizophrenic isolation, passivity and

³³ [1926] 3 All ER 441.

³⁴ *Swan v Swan* [1953] 2 All ER 845, 857, [1953] P 258; *Palmer v Palmer* [1954] 3 All ER 494; *Williams v Williams* [1926] 3 All ER 441.

³⁵ *Lissack v Lissack* [1950] 2 All ER 233, [1951] P 1; *White v White* [1949] 2 All ER 339.

³⁶ *Williams v Williams* [1963] 2 All ER 994 per Lord Reid, [1964] AC 722-23.

³⁷ *Crump v Crump* [1965] 2 All ER 980.

stillness of the wife and the impact of those manifestations on the health of the husband. Similar are situations where one of the spouses is struck down by physical diseases such as disseminated sclerosis, cerebral thrombosis or other illnesses that for years encumber all communication or active co-operation in the home. These situations, engulf both spouses in personal tragedy. However, no court would characterise such sufferings as cruelty.³⁸ The mere branding of a spouse as a schizophrenic would not be sufficient and the degree of mental disorder must be proved to be such that both spouses cannot reasonably be expected to live together.³⁹

PROOF: SUFFICIENCY OF EVIDENCE: CORROBORATION

Judicial opinion on the question of standard of proof in case of the matrimonial offence of cruelty cannot be said to have been quite uniform. It has at times been said that accusation of cruelty is a very grave and serious charge and, therefore, the court should insist on proof with the same degree of strictness as in the case of a criminal offence. On the other hand, it has been said that the court should not require proof with any more strictness that is required in a civil case. Section 23 of the Act lays down that the court shall decree the relief if it is satisfied that the 'other party has treated the petitioner with...cruelty'. The evidence must preponderate in favour of the petitioner and must be clear and satisfactory. The offence charged must be established on a 'preponderance of probability'. The court would not be satisfied that it is established if it entertains any real doubt on the matter. What is required is that cruelty must be strictly proved. The word 'strict' is sufficiently apt to describe the measure and standard of proof and it is unnecessary to introduce any question of a standard of proof required of a criminal charge. Reference may also be made to notes to s 23 under 'standard of proof' and 'corroboration'.

DELAY

See notes under s 23.

CONDONATION

See notes under s 23.

³⁸ *Priday v Priday* [1970] 3 All ER 554, 561; *Nirmala Jagesha v Manohar Jagesha* AIR 1991 Bom 259 (overruled in *A v H* AIR 1993 Bom 70).

³⁹ *Rammaram v Rameshwari* AIR 1988 SC 2260, *Alka Sharma v Abinash Sharma* AIR 1991 MP 205

CLAUSE (IB): DESERTION: SEPARATION: ANIMUS DESERENDI

It may be noticed that desertion per se was not a ground for relief by way of divorce prior to the amendment of this section by the Amending Act of 1976, but was only a ground for the relief of judicial separation under cl (a) of s 10(1) which was in identical terms.

The expression 'desertion' in the context of matrimonial law represents a legal conception and is only very difficult to define. The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other. It has been said more than once that no judge has ever attempted to give a comprehensive definition of desertion, and that probably no judge would ever succeed in doing so, but among the descriptions of desertion one which has always appealed to courts trying matrimonial causes is that 'desertion' is 'a withdrawal not from a place, but from a state of things'.⁴⁰ The essential ingredients of this offence, in order that it may furnish a ground for relief, are:

- (i) the factum of separation; and
- (ii) the intention to bring cohabitation permanently to an end—*animus deserendi*;
- (iii) the element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period.

The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the *Explanation*.

The *Explanation* purports to give the meaning of the expression 'desertion' with all its grammatical variations and cognate expressions. Permanent forsaking and abandonment⁴¹ are expressions often used in the context of the matrimonial offence of desertion. The *Explanation* has widened the definition of desertion to include 'wilful neglect' of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence, desertion must be without reasonable cause and without the consent or against the wish of the petitioner and that wilful neglect of one spouse by the other is desertion within the meaning of this expression. It will be seen that the meaning given is somewhat tautological but the *Explanation* has the merit of making it abundantly clear that the legislature intended to give to the

⁴⁰ *Pulford v Pulford* [1923] P 18, 21; *Khorsbed v Muncherji* (1937) 38 Bom LR 1141-42.

⁴¹ *Ibid* s 18(2)(a) of the Hindu Adoptions and Maintenance Act 1956.

expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage. It is also clear that the meaning given includes both actual desertion as well as what is generally referred to as constructive desertion in which, although there is no ostensible abandonment of one spouse by the other, there is expulsive conduct manifesting *animus deserendi*. One effect of including wilful neglect in the meaning of desertion is that wilful neglect of one spouse by the other is sufficient to establish abandonment or expulsive conduct and amounts to proof of the *animus deserendi* on the part of the latter which is an essential ingredient of the offence. This will have considerable bearing in cases of constructive desertion. The *Explanation* is intended obviously to avoid attempts at defining an expression, which is extremely difficult, if not impossible, to define in a manner which would fully bring out its comprehensive connotation. To satisfy the requirement of the rule, it is enough that the abandonment was without reasonable cause and without consent. It is not necessary to show that it is against the wish of the person charging it.

The statutory requirements as to time during which the 'state of things' should continue is fixed at a continuous period of not less than two years immediately preceding the presentation of the petition. Thus, the quality of permanence is one of the essential elements, which differentiates desertion from wilful or voluntary separation. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely: (1) the factum of separation; and (2) the intrusion to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent; and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.⁴² When specific facts as regards desertion are neither pleaded nor proved, and contrary facts emerge demonstrating that it was the conduct of the husband that forced the wife to live separately, a decree cannot be passed on this ground.⁴³

A large body of case law has developed around the legal significance of 'desertion' both in England and in India and the broad general rules deducible from the same, will be of great assistance and guidance in cases which fall for determination under the present enactment, though of course opinions

⁴² *Bipin Chander v Prabhawati* AIR 1957 SC 176; *Pratt v Pratt* [1939] AC 417; *Williams v Williams* [1939] 3 All ER 825 (CA); *Dunn v Dunn* [1948] 2 All ER 822; *Kamal Kumar v Kalyani* AIR 1988 Cal 111 (*Explanation* considered two elements on the part of asserting spouse and besides that, two elements on side of spouse claiming to be deserted, living or not living with husband's sister).

⁴³ *Harish Kumar v Anita* AIR 2003 MP 197.

expressed in the context of enactments, even worded slightly different must always be read with the caution most commonly needed in their application to cases arising in different circumstances and varied situations. Moreover, as already pointed out, the language of the present clause and *Explanation* are intended to give a wide import to the expression though no radical innovation has been made. In *Bipin Chander v Prabhawati*,⁴⁴ the Supreme Court, after posing the question ‘What is desertion?’, observed that the legal position had been admirably summarised in *Halsbury’s Laws of England*, 3rd edn, Vol 12, paras 453–54. The quote is attributed to two paras in *Halsbury’s* but four paras are given here:⁴⁵

In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other’s consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the court has discouraged attempts at defining desertion, there being no general principle to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, ‘the home’. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exist independently of its duration, but as a ground for...it must exist for a period of at least...years immediately preceding the presentation of the petition or, where the offence appears as a cross-charge of the answer. Desertion...differs from the statutory grounds on adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence.

The Supreme Court, in the case mentioned above, made some general observations and summed up some other important principles that will

44 AIR 1957 SC 176; *Om Prakash v Prabha* AIR 1978 Del 240 (husband’s petition for judicial separation dismissed—wife treated badly even after birth of child); *Ram Chander Lamba v Adarsh Lamba* AIR 1987 Del 99; *Sant Kumar Agarwal v Nandini Agarwal* AIR 1990 SC 594 (question of desertion has to be inferred from the facts, brother and sister of one family married to brother and sister of another family—*Gurawat* custom of Madhya Pradesh); *Sukumar v Tripti* AIR 1992 Pat 32 (husband alleging desertion, inconsistency in testimony of husband and his father, no decree can be passed); *Perminder Charan Singh v Harjit Kaur* AIR 2003 SC 2310 (wife driven out, divorce on ground of desertion disentitled).

45 *Halsbury’s Laws of England*, 4th edn, Vol 13, para 576–77.

afford considerable guidance in cases arising under the Act. It was pointed out that desertion is a matter of inference to be drawn from the facts and circumstance of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference, that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. However, it is not necessary that they should commence at the same time. The *de facto* separation may have commenced without the necessary *animus* or it may be that the separation and the *animus deserendi*, coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law has prescribed a period of desertion as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the *locus poenitentiae*, thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse comes to an end and if the deserted spouse unreasonably refused the offer the latter may be in desertion and not the former. Hence, it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable.⁴⁶ Opposing applications for restitution of conjugal rights and judicial separation could show that there was no intention on part of the spouse filing the application for judicial separation to resume marital life, therefore desertion could be held to be proved.⁴⁷

Some of the principles summed up above were reaffirmed by the Supreme Court in the undermentioned decisions on the subject⁴⁸ and the essential

46 *Bipin Chander v Prabhawati* AIR 1957 SC 176; *Jiyubai v Ningappa* AIR 1963 Mys 3; *Elokeshi Chakraborty v Sunit Chakraborty* AIR 1991 Cal 176 (deserting spouse must prove factum of separation and deserted spouse must show absence of conduct giving reasonable cause and absence of consent). *Gajendra v Madhu Malti* AIR 2001 MP 299 (no intention to resume cohabitation-reconciliation failed, decree proper).

47 *P Kalyanasundaram v K Paquialatchamy* AIR 2004 Mad 43.

48 *Lachman v Meena* AIR 1964 SC 40, 48; *Robini Kumari v Narendra Singh* AIR 1972 SC 459; *Niranjan Singh v Gurudev Kaur* 1983 PLR 239 (very long period of separate living and wife having described herself as widow); *Angalla Padmalatha v A Sudarshan* AIR 2000 AP 353 (case of abandonment by wife); *Laxmi Mallik*

continued on the next page

element of *animus deserendi* examined at some length. Reference may be made to *Umesh Kumar v Shashi Kumari*.⁴⁹ Absence of *animus revertendi* could be held tantamount to cruelty if the wife left the home without reason.⁵⁰

SEPARATION

One of the essential ingredients of desertion is separation of one spouse from another and there can, therefore, be no desertion while the parties are living together. So long as cohabitation continues, ie the parties are living together, persistent and even wanton refusal of one or other of the parties to have sexual intercourse is not by itself sufficient to amount to desertion because it is neither abandonment nor living apart,⁵¹ but such refusal, if unjustified, may amount to constructive desertion when the spouse refusing sexual intercourse would have known that the effect of the refusal would be that the other spouse would refuse to live with him.⁵² Unreasonable refusal may be regarded as a grave and weighty matter and can amount to constructive desertion having regards to the circumstances of the case.⁵³

In an exceptional case, there may be desertion, although husband and wife are living in the same dwelling, if there is such a forsaking and abandonment by one spouse of the other that the court can say that the spouses had ceased to be one household and had become two separate households.⁵⁴ It seems that cases of this nature which do not often arise would under the present section fall for consideration under the *Explanation* where it is laid down that desertion includes wilful neglect.

CONSENSUAL SEPARATION

As to separation which begins by being a consensual separation and the situation changing by one of the spouses withdrawing the consent and offering to resume cohabitation, reference may be made to the

v Mayadhar Malik AIR 2002 Ori 5 (illicit relationship—reasonable cause); *Pratima Biswal v Amulya Kumar Biswal* AIR 2002 Ori 125 (illicit relationship of husband—no desertion by wife); *Chintala Venkata v Shyamala* AIR 2003 AP 322 (intention to desert clearly established); *Mahila Ramjanki v Pavan Sharma* AIR 2003 MP 281 (no reasonable cause for desertion—decree proper).

49 *AIR 1987 Del 235* (wife leaving matrimonial home to continue job without any intention of bringing cohabitation to an end—leaving job not pre-condition of marriage—wife earning lady).

50 *Karuna v Jhwan Prakash* AIR 2002 HP 127.

51 *Weatherley v Weatherley* [1947] AC 628, [1947] 1 All ER 563.

52 *Hutchinson v Hutchinson* [1963] 1 All ER 1, see under 'Wilful neglect'.

53 *Slon v Slon* [1969] 1 All ER 759.

54 *Baker v Baker* [1952] 2 All ER 248.

undermentioned decision of the court of appeal in England⁵⁵ and the cases cited therein. Where the wife was living separately from the husband and there is no evidence that the consent was withdrawn, desertion cannot be said to have been established.⁵⁶

‘CONTINUOUS PERIOD OF NOT LESS THAN TWO YEARS...’

Desertion is a continuing offence and the element of permanence necessarily involved in it requires that both separation and *animus deserendi* should continue during the entire statutory period of two years immediately preceding the presentation of the petition. It must be noticed that the continuing offence of desertion for the statutory period of at least two years can never become complete until the petition is actually presented. The offence is not complete and remains inchoate till the presentation of the petition however long might have been the period of previous desertion. It necessarily follows that during this period the offending spouse has always the *locus poenitentiae* to go back to the deserted spouse. It also follows that it is necessary that during all the period that there has been desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable.⁵⁷ Desertion differs from other matrimonial offences such as adultery, in that it does not consist of an act or a number of acts separate and distinct in themselves, but is rather an activity or course of a conduct which must persist for the statutory period upto the presentation of the petition,⁵⁸ and it is not permissible, if the period is broken, to add the broken periods together so as to make a sum of two years. The offence founding the cause of action is not complete—it is as if it were inchoate—until the petition is filed. If one spouse has committed adultery or has treated the other with cruelty, the latter has an accrued right to adopt proceedings. He or she may at once seek relief and is not bound to reinstate the offending spouse. The deserted spouse has no such right, no such election. If the deserting spouse genuinely desires to return, the spouse cannot refuse reinstatement.⁵⁹

Once a state of desertion has arisen it continues until it is terminated.⁶⁰ So, when the factum and intention to desert on the part of a spouse is

55 *Gallagher v Gallagher* [1965] 2 All ER 967; *Fraser v Fraser* [1969] 3 All ER 654; *Nuttley v Nuttley* [1970] 1 All ER 410 (not desertion).

56 *Aryasomayajulu v Surya Kumari* AIR 1980 AP 318.

57 *Bipin Chander v Prabhawati* AIR 1957 SC 176.

58 *W v W* (No 2) [1954] 2 All ER 829, 832–33; *Silabai v Ramchandra* (1957) 59 Bom LR 885, 890–91; *Khanindra Das v Kusum* AIR 1991 Gau 54 (conditions essential); *Madan v Chitra Manna* AIR 1993 Cal 33.

59 *Perry v Perry* [1952] 1 All ER 1076, 1079–80.

60 *Cohen v Cohen* [1940] AC 631, [1940] 2 All ER 331 (HL).

established, the intention is presumed to continue, unless the offending spouse proves genuine repentance and sincere and reasonable attempt to go back to the deserted spouse or in case of constructive desertion to get back the injured spouse.⁶¹ The deserting spouse is only bound to make reasonable attempts. So, if on the facts it appears that the petitioner had made it plain to the deserting spouse that the latter would not be received back or has repelled all the advances made by the latter towards a resumption of married life, the petitioner cannot complain that the deserting spouse has persisted in the desertion without cause. There can be cases where it would be unreasonable to expect the deserting spouse to make attempts to end the desertion.⁶²

The question whether a deserting spouse has a reasonable cause for not trying to bring the desertion to an end and the corresponding question whether desertion without cause has existed for the necessary period must always be a question of fact.⁶³ The question for consideration in such cases is, 'is the conduct of the deserted spouse such as to exempt the deserting spouse from making any attempt to put an end to the desertion or from attempting any reconciliation?'⁶⁴ In considering the conduct of the deserted spouse in any such case the court will have regard to the facts of the particular case, in order to ascertain what in fact was the impact on the mind of the deserting spouse of anything which was said or done by the deserted spouse.⁶⁵

A notice by one spouse asking the other to resume cohabitation by itself is not sufficient to prove desertion.⁶⁶ Similarly an offer to join the other spouse after a desertion cannot prove *animus revertendi* unless such an offer is actually complied with.⁶⁷

The mere fact that during the period when the spouses were living apart maintenance was paid by the husband to the wife will not prevent desertion running if it appears that there was no agreement between the spouses to live apart. The agreement to pay maintenance is not in itself proof of consent to live apart.⁶⁸ When desertion is proved but parties live together for a short time at the intervention of the court, such a fact cannot disprove desertion.⁶⁹

61 *Lachman v Meena* AIR 1964 SC 40, 49; *Bowran v Bowran* [1925] P 187, 195; *Cohen v Cohen* [1940] AC 631, [1940] 2 All ER 331 (HL); *Sifton v Sifton* [1939] 1 All ER 109, [1939] P 221; *Bharat Ram v Ram Kali Devi* AIR 1984 All 274.

62 *Pratt v Pratt* [1939] AC 417, 420; *Cohen v Cohen* [1940] AC 631.

63 *Tickler v Tickler* [1943] 1 All ER 57, 59; *Krishana Lal v Nitu* AIR 1986 Del 460 (subsequently reversed in *Nitu v Krishan Lal* AIR 1990 Del 1).

64 *Brewer v Brewer* [1961] 3 All ER 957, 964.

65 *Lachman v Meena* AIR 1964 SC 40, 53.

66 *Nitu v Krishnalal* AIR 1990 Del 1 (reversing *Krishnalal v Nitu* AIR 1986 Del 460).

67 *P Kalyanasundaram v K Paquialatchamy* AIR 2004 Mad 43.

68 *Pardy v Pardy* [1939] 3 All ER 779, 782.

69 *Om Prakash v Shreshta Devi* AIR 1993 HP 71.

‘WILFUL NEGLECT’

The expression ‘wilful neglect’ used in the *Explanation* is not defined in the Act. The word ‘wilful’ in this phrase is important. An act or omission done by accident or inadvertence is not wilful, nor is it, on the other hand, absolutely necessary in the present context that to be wilful, the act or omission which constitutes neglect should be deliberate and intentional. In the context of matrimonial law, wilful neglect would seem to mean that the person is consciously acting in a reprehensible manner in the discharge of his marital obligations or is consciously failing in a reprehensible manner in the discharge of those obligations; and connotes that degree of neglect which is shown by an abstention from an obvious duty, attended by a knowledge of the likely results of the abstention. Breach of every tie of marriage or failure to discharge every tie of marriage or failure to discharge every marital obligation cannot be regarded as wilful neglect. Thus for instance, in a case where the marriage has been consummated and cohabitation is continued, it can hardly be said that mere refusal of sexual intercourse, howsoever persistent by one of the spouses, amounts to wilful neglect or purports to conclude the matrimonial relationship,⁷⁰ but wilful neglect to maintain the wife without reasonable cause would be desertion. Neglect, to become desertion must be such as amounts to forsaking or abandonment of one spouse by the other by a conscious disregard of the duties and obligations of the married state considered as a whole.⁷¹

CONSTRUCTIVE DESERTION

It is a well-established principle that proof of factum of separation, which is one of the essential ingredients of the matrimonial offence of desertion, does not consist merely in ascertainment of which party left the home first. The rule is now well-established that a spouse may be guilty of such misconduct as would render the continuance of marital relations so unbearable that the other spouse feels compelled to leave the matrimonial home and in such a case it is the former and not the latter, who is the deserter. There is no substantial difference between the case of a husband who leaves his wife with the intention of terminating cohabitation and the case of a husband who with like intent, evidenced by misconduct, brings the cohabitation to an end by virtually compelling the wife to depart from the matrimonial

⁷⁰ *P v P* [1964] 3 All ER 919.

⁷¹ *Om Vati v Kishen Chand* AIR 1985 Del 43 (parties that are living separately—husband not attending funeral of child despite information—not paying maintenance ordered by court). *Bhavana Aduani v Manohar* AIR 1992 MP 105 (wife guilty of wilful neglect, sufficient to constitute desertion).

home. In *Lang v Lang*,⁷² the Privy Council summarised in an impeccable form the principles and made some general observations on the question of constructive or indirect desertion which gives authentic guidance on the subject and will be found very instructive:

It has been recognised that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind (their Lordships will assume this to be the husband) may be, by reason of conduct on his part, making it unbearable for a wife with reasonable self-respect, or powers of endurance, to stay with him, so that he is the party really responsible for the breakdown of the marriage. He has deserted her by expelling her; by driving her out. In such a case the factum is the course of conduct pursued by the husband—something which may be far more complicated than the mere act of leaving the matrimonial home. It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them but she would not be justified in doing so. Such irritating idiosyncrasies are part of the lottery in which every spouse engages in marrying, and taking the partner for the marriage 'for better, for worse'. The course of conduct—the 'factum'—must be grave and convincing.

Conduct which falls short of legal cruelty may justify one spouse in leaving another, provided it is of a grave and convincing character.⁷³ It is not possible to deduce any principle of law by reference to which it can be determined in every case on which side of the line the case falls when this text of grave and convincing conduct is to be applied; the issue in the main would be one of fact and no criterion can be propounded which would be very helpful. In these cases, it has to be noted that the legislature has not thought it fit to make the continuous unhappiness of one spouse caused by the unkindness, the lack of consideration, or the selfishness or every degradation of the other spouse a ground for obtaining relief. It is essential to examine, as Lord Green MR observed in the undermentioned case,⁷⁴ the

⁷² [1954] 3 All ER 571, 573; *Narayan Prasad v Prabhadevi* AIR 1964 MP 28; *Jyotish Chandra v Meera Guha* AIR 1970 Cal 266; *Pratt v Pratt* [1939] AC 417 per Lord Macmillan and also per Lord Romer at p 428; *Cohen v Cohen* [1940] AC 631; *Sukhma Devi v Niranjan Singh* AIR 1983 Del 469.

⁷³ *Edwards v Edwards* [1949] 2 All ER 145.

⁷⁴ *Buchler v Buchler* [1949] P 25, [1947] 1 All ER 319, 322; *Marjoram v Marjoram* [1955] 2 All ER 1 (sluttishness alone is not a sufficient ground); *Bartholomew v Bartholomew* [1952] 2 All ER 1035 (wife dirty in her person and the home—no ground); *Indira Devi v Kumaran* AIR 1982 Ker 78 (wife was pregnant and left for father's home).

actual facts to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the borderline which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent to expulsion from the matrimonial home. 'It is', as Asquith LJ observed in the same case, 'possible to say of certain courses of conduct that they should not amount to constructive desertion, and of certain other courses that they could not fail to do so.... But between the extremes indicated there is obviously a no-man's land where the issue is one of fact'.⁷⁵ One effect of including 'wilful neglect' in the meaning of desertion (*Explanation*) is that such neglect of one spouse by the other is sufficient to establish expulsive conduct. The neglect to become desertion must be such, as amounts to forsaking or abandonment by a conscious disregard of the duties and obligations of the married state considered as a whole.⁷⁶

In case of constructive desertion also, there must be proof of both the essential ingredients of *factum* and *animus deserendi* on the part of the offending spouse. The law relating to this requirement was reviewed by the Privy Council in the abovementioned case and it was laid down that *prima facie* in these cases, a person is presumed to intend the consequences of his acts, though the inference may be rebutted; and if the whole of a husband's conduct is such that a reasonable man must know that it will probably result in the departure of his wife from the matrimonial home, the fact that the husband did not want this consequence to ensue does not rebut the inference that he intended the probable consequences of his acts and thus intended his wife to leave the home. Conduct which would give rise to this inference must be grave and convincing and where it exists proof of actual intention to bring the matrimonial consortium to an end would not be required. Apart from rebutting evidence, therefore, such conduct would be sufficient proof of an intention to disrupt the home and it would be no answer that his desire was that his wife will stay and the home will not be disrupted.⁷⁷

It is sometimes said that a charge of constructive desertion cannot be proved by evidence of conduct, alleged to have caused the petitioner to leave the matrimonial home, of the nature of cruelty, but not amounting to cruelty in law.⁷⁸ The true rule of the matter would seem to be that it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That again does not cover the whole area of constructive desertion. Grave and weighty matters may be alleged which are quite

⁷⁵ *Buchler v Buchler* [1947] 1 All ER 319.

⁷⁶ See 'wilful neglect' above; *Ambujam v TS Ramaswamy* AIR 1973 Del 46.

⁷⁷ *Lang v Lang* [1954] 3 All ER 571.

⁷⁸ *Pike v Pike* [1953] 1 All ER 232, 235.

different in kind and quite as serious, if not more serious, than cruelty.⁷⁹ In this class of cases, the facts are often somewhat complex and overlapping. If the facts and circumstances are such which satisfy the general test already discussed, the court may as well reach the conclusion that the conduct of the other spouse was equivalent to expulsion and that the complaining spouse was justified in leaving the matrimonial home.⁸⁰ The acts sufficient to satisfy this test must be of a serious and convincing nature, but conduct short of an actual matrimonial offence may be sufficient. The conduct, however, must from the very nature of the offence of desertion, obviously be of a grave and convincing character. It may include wilful neglect of the petitioner by the other party to the marriage.

MUTUAL DESERTION

It is conceivable, as held in England, that the court may grant simultaneous decrees on the ground of desertion.⁸¹ This section, however, envisages the desertion of one of the spouses qua the other, therefore in India, at present, such mutual desertion is not a ground for divorce.⁸²

GOOD CAUSE FOR SEPARATION

It is a well-established principle that a spouse who withdraws from cohabitation for what is described as a good cause or a just cause or an effective cause such as adultery⁸³ or cruelty, cannot be said to be guilty of desertion,⁸⁴ for in such a case, it is the conduct⁸⁵ of the offending spouse which is the cause of separation and the spouse who leaves the matrimonial home cannot be said to have acted from any *animus deserendi*. Rejection of divorce proceedings on the alleged ground of desertion is proper when the wife apprehends danger to her life, but is willing to resume marital life under a proper and conducive atmosphere.⁸⁶ Apart from other causes to be presently noted, adultery and cruelty would afford complete defence to any

79 *Timmnis v Timmnis* [1953] 2 All ER 187.

80 *Foster v Foster* [1953] 2 All ER 518; *Pike v Pike* [1953] 1 All ER 232, 235. As to whether 'drunkenness' amounts or not to expulsive conduct, see *Hall v Hall* [1962] 3 All ER 518.

81 *Price v Price* [1986] 3 All ER 543.

82 *Gur Bachan Kaur v Preetam Singh* AIR 1998 All 140.

83 *Samraj Nadar v Abraham* AIR 1970 Mad 434 (petitioner-husband living in adultery).

84 *Baker v Baker* [1953] 2 All ER 1199; *Kuppuswami v Alagammal* AIR 1961 Mad 391. Also second marriage of the husband as furnishing a good cause for separation: *Pullaiah v Rushingamma* AIR 1963 AP 323.

85 *Sarla v Krishan Chandra* AIR 1982 Raj 220 (persistent unjustified accusations of unchastity and loose character amounted to expulsive conduct); *Prabhavati v Somasankar* AIR 2002 Kant 431 (apprehension of physical harm-citing valid reasons-no desertion).

86 *Sunil Kumar v Kunti* AIR 2003 Jhar 42.

petition by the other spouse for judicial separation or divorce on the ground of desertion, unless the court is satisfied that there was condonation of such adultery or cruelty or that there was such connivance in the matter of the adultery complained of, as would render it unjust to entertain the objection.⁸⁷ An honest and reasonable belief or as it is sometimes said a bona fide and reasonable belief, even though erroneous, that the other spouse has committed adultery may be a good cause and justification for withdrawal from cohabitation. It has been held in England that a wife's belief induced by her husband's conduct, that he has committed adultery may justify her, until that belief is proved to be without foundation, in leaving the matrimonial home and living apart.⁸⁸ The belief, however, must be reasonable; it must be sensible and not the result of caprice or stubborn and distorted judgment.⁸⁹ The reasonable belief which affords an answer to a charge of desertion cannot be said to have continued to exist after it has been dispelled. No exhaustive statement of the ways in which such a belief could be dispelled can be expected as the question must resolve itself into one of fact. A husband withdrew from cohabitation with his wife on the ground that he suspected her of having committed adultery and in proceedings by the wife for restitution of conjugal rights the court found that the husband had reasonable grounds for his suspicions. However, a petition filed by the husband thereafter for divorce on the ground of adultery was dismissed on as adultery was not proved. In subsequent proceedings by the wife for maintenance, it was held that the husband was not entitled to resist the claim on the ground that he had bona fide and reasonable belief that the wife had committed adultery.⁹⁰

When no evidence of cruelty, though imputed, is forthcoming and the wife was able to prove the circumstances under which she was driven out of the matrimonial home, it could not be said that the husband had proved desertion without a reasonable cause. He was therefore not entitled to a decree of divorce.⁹¹

An admission on the part of one spouse as regards non cohabitation and a contrary contention that the other spouse had in fact intended to desert would not result in a decree of divorce as a person cannot be permitted to take advantage of his or her own wrong.⁹²

Remarriage of Husband

Desertion within the section implies more than merely separate residence and separate living. Section 18(2)(a) of Hindu Maintenance and Adoption

⁸⁷ See s 23 (1)(b).

⁸⁸ *Allen v Allen* [1951] All ER 724, 731.

⁸⁹ *Ibid Cox v Cox* [1958] 1 All ER 569.

⁹⁰ *Ibid.*

⁹¹ *Ayodhya Singh v Meera Devi* AIR 2004 Jhar 88.

⁹² *Savitri Pandey v Prem Chandra Pandey* AIR 2002 SC 591.

Act 1956, entitles a wife to live separately from her husband, without forfeiting her claim to maintenance, if he is guilty of desertion. The effect of that Act is that a wife is entitled to claim separate residence and maintenance from her husband if he should marry again (apart from her other rights to seek relief). The High Courts of Andhra Pradesh⁹³ and Mysore⁹⁴ had taken the view that if in any such case the wife was living separately from the husband it could not be said that she had deserted her husband without reasonable excuse. The different view taken by the High Court of Allahabad⁹⁵ was that the fact of the remarriage of the husband would not, without anything more, necessarily afford reasonable cause for desertion. According to this latter view, the question for the court would still remain as to what was the impact of the fact of the remarriage of the husband, on the mind of the wife. In case the consideration of the remarriage of the husband failed to have any impact on the mind of the wife, remarriage of the husband would not afford reasonable cause for desertion. The Supreme Court has accepted the latter view.⁹⁶

However, when the wife was forced to leave the matrimonial home due to mistreatment and the husband had entered into a second marriage, it was held that the husband could not on the peculiar facts claim that the wife had deserted him, nor could he claim cruelty and irretrievable breakdown due to the second marriage as grounds for divorce.⁹⁷

Wife driven out

See the undermentioned case.⁹⁸

TERMINATION OF DESERTION

Desertion may be terminated at any time by resumption of cohabitation, because a resumption of cohabitation is the exact negation of a state of desertion. There must be common or mutual intention of the parties to resume cohabitation in circumstances showing that a true reconciliation has been effected. Any other rule would hamper attempts at reconciliation.⁹⁹ No court has attempted to give a completely exhaustive definition of cohabitation. Desertion being a withdrawal from a 'state of things' resumption of cohabitation must at least mean resumption of that 'state of things'.

93 *Pulliah v Rushingamma* AIR 1963 AP 323.

94 *Siddegowda v Parvathamma* AIR 1965 Mys 299; *Mallappa v Neelawwa* AIR 1970 Mys 59.

95 *Robini Kumari v Narendra Singh* AIR 1970 All 102.

96 *Robini Kumari v Narendra Singh* AIR 1972 SC 459.

97 *Mst Butti v Gulab Chand* AIR 2002 MP 123.

98 *Surjit Kaur v Tirash Singh* (1979) PLR 732.

99 *Bartram v Bartram* [1949] 2 All ER 270; *Mummery v Mummery* [1942] 1 All ER 553.

This may be evidenced by a common intention of the parties to set up once again the matrimonial home. Sexual intercourse would beyond doubt be the most important incident in the marital relationship and very cogent evidence of the intention of the parties to effect reconciliation and resume cohabitation. There is no absolute rule, however, that desertion is terminated or interrupted by casual acts of intercourse between the spouses or casual visits without any return to the routine of common life, or anything resembling the re-establishment of the matrimonial relationship. However, in any event even such intercourse would be strong and weighty evidence to be considered in the light of the whole facts and merits of the case. It would *prima facie* seem unreasonable that an act which is accorded such a decisive effect as an affirmation by the injured party of the married state should be able to take place consistently with the uninterrupted continuance of a state of desertion which while it continues; amounts to a negation of married state. These considerations should be stronger against a deserted husband. The criterion would of course be whether considering all the facts it can be said that there was or must have been the intention to resume married life. It has been held in England that casual acts of intercourse should not be regarded as proof of resumption of marital relationship where a wife, though participating in such acts, in all other respects repudiated the relationship.¹

Desertion may also be terminated by a supervening *animus revertendi* expressed by a genuine offer to return to the deserted spouse or in case of constructive desertion by a bona fide attempt to get back the aggrieved spouse. If a deserting spouse takes advantage of the *locus poenitentiae* provided by law and goes back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life before the statutory period is out or even thereafter, before any proceedings for relief have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the entire position would become different and the latter, instead of the former, would become the deserter.²

OFFER OF RECONCILIATION

A deserting spouse may at any time before the institution of proceedings by the other spouse bring the desertion to an end by sufficient offer of reconciliation. It must be an offer to return and must involve readiness and willingness to resume cohabitation in the ordinary sense of the word. The offer must be a genuine offer made in good faith and not merely to lay a

1 *Perry v Perry* [1952] 1 All ER 1070, *Whitney v Whitney* [1951] 1 All ER 301.

2 *Bipin Chander v Prabhawati* AIR 1957 SC 176.

foundation for an intended petition or to forestall or defeat any proceeding by the injured spouse. The offer must be conciliatory and not hedged in with any unreasonable qualification or condition. In a case of mere desertion, the offer to return may be enough. A case of constructive desertion may raise different considerations. There may be cases where the situation created by the conduct of the deserting spouse was such that a mere offer by word of mouth or by letter to resume cohabitation may not suffice, unless it is accompanied by expressions of repentance and contrition. Such a situation may exist for instance where the offer of reconciliation is made by a husband who has been guilty of physical violence or other acts of cruelty of a serious nature or of other conduct of a gross nature and the wife had to leave the house in fear or helplessness. In such a case, it cannot be said that a bare offer to return or take back the aggrieved spouse will suffice to terminate the desertion.

When a genuine offer of reconciliation is made, the other spouse cannot refuse reinstatement. However, the other spouse as the injured party will be justified in imposing reasonable conditions in order to ensure a genuine reconciliation and resumption of the matrimonial home with all the implications of marital life. The conditions sought to be imposed must be in good faith. The nature of the previous behaviour and degree of misconduct of the deserting spouse would determine the reasonableness or otherwise of such conditions. The unjustified rejection of a sufficient offer of reconciliation would in itself constitute desertion. Such for instance, would be the case where in answer to an offer of reconciliation by the wife, a husband imposes conditions which he knows would not be accepted and by his attitude and conduct shows that he is resolved to make a temporary separation an excuse for refusing resumption of matrimonial home. The matter was put very clearly by Lord Merriman when he said that the unjustified refusal by the spouse who has been deserted to resume cohabitation not merely terminates the desertion but also reverses the process; 'it turns the tables' or 'puts the boot on the other leg' and it is immaterial whether the case is one of mere desertion which is terminable by a simple offer on the part of the deserter to return or in case of constructive desertion terminable, with more difficulty no doubt, but terminable by appropriate repentance and appropriate assurance of amendment of such kind, according to the individual circumstances, as the aggrieved spouse is not justified in refusing.³ In each case, the question must be determined on its own merits. There may be some conduct so gross that no woman could be expected ever to resume

³ *Everitt v Everitt* [1949] 1 All ER 908, 916 (Reference may also be made to the following cases which are illustrative of the rule: *Casey v Casey* [1952] 1 All ER 453; *Slowson v Slowson* [1942] 2 All ER 527; *Price v Price* [1951] 1 All ER 877; *Holborn v Holborn* [1947] 1 All ER 32).

cohabitation with the husband. The husband's merits may be so slight that he cannot reasonably hope ever to be taken back. Thus for instance, if the husband has been guilty of adultery which is uncondoned or of cruelty of so atrocious a character that the wife cannot possibly be expected to subject herself to a risk of recurrence. In such cases, the actual separation must continue to have the quality of desertion by the husband.⁴ A different rule would require that the wife should be regarded as a deserter even in such a case because she refused reinstatement. That would be contrary to the plain reason and good sense underlying the doctrine of desertion. It is submitted that the proper question in these cases would be whether, having regard to the whole background and facts and circumstances both prior and subsequent to the desertion, the deserting spouse can be said to be ready and willing to resume the marital home.

DESERTION AND CRUELTY

It is sometimes said that desertion of itself cannot be cruelty.⁵ In *Cade v Cade*,⁶ it was held in England that the same conduct could constitute expulsive conduct founding a charge of constructive desertion and could also be an element of conduct founding a charge of cruelty. It may at times be impossible to draw the line between the two because very often the facts are mixed so that it is impossible to extricate one from the other. This may have bearing on cases of constructive desertion of which it may well be said that the same facts also amount to cruelty. It is commonplace that constructive desertion and cruelty may often in substance be the same thing, proved by the same evidence.⁷ Even so, a charge of cruelty must be distinctly pleaded and proved as such.⁸ The court, even if it is satisfied on a charge of desertion that the evidence is sufficient to establish, cruelty, must insist on the pleading being put in order and should raise the necessary issue before granting relief. As discussed above, since the charges of cruelty and desertion must be distinctly proved, a person claiming contradictory pleas of desertion and cruelty is not entitled to any relief.⁹

ONUS AND STANDARD OF PROOF

It is incumbent on the petitioner to prove that desertion without reasonable

1 In *Everitt v Everitt* supra, a number of cases on the subject were examined by Lord Merriman; *Sushil Kumari v Prem Kumar* AIR 1976 Del 512 (offer held not sincere: also accusation of adultery against wife).

5 *Carpenter v Carpenter* [1955] 2 All ER 449, 451.

6 *Cade v Cade* [1947] 1 All ER 609.

7 *Cade v Cade* supra.

8 *Pike v Pike* [1953] 1 All ER 232.

9 *Vinipani v Sarojini* AIR 1991 Kant 128, *Shrawan Kumar v Rita Devi* AIR 2003 Jhar 54 (desertion established decree granted).

cause subsisted throughout the statutory period. Before granting relief on the ground of desertion the court must be satisfied that the matrimonial offence complained of is established. In *Bipin Chander v Prabhawati*,¹⁰ the Supreme Court referred to the law in England on the question of desertion and observed: 'It is also well-settled that...the plaintiff must prove the offence of desertion beyond all reasonable doubt'. On this question of standard of proof, reference may also be made to notes under s 23 *post*. In *Lachman v Meena*,¹¹ the Supreme Court held that the onus lies on the petitioner to establish that the desertion was without cause and stressed the importance of avoiding the fallacy which lies in a failure to distinguish between a legal burden of proof which rests on the petitioner and a provisional burden raised by the state of evidence which may shift from one party to another. The legal burden throughout the case is on the petitioner to prove that the wife (for instance where the husband is the petitioner) deserted him without cause. To discharge that burden he may rely on the fact that he asked her to join him and she refused. From that fact the court may infer that she deserted him without cause but it is not bound to do so. Once he proves that fact of refusal she may seek to rebut the inference of desertion by proving that she had just cause for her refusal and usually it would be wise for the respondent (wife) to do so. Even if she does not affirmatively prove just cause, the court has still, at the end of the case to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause? Reference may also be made to notes under s 23 on 'Standard of Proof: Corroboration'.

DESERTION AND DOCTRINE OF CONDONATION

The doctrine of condonation in its strict sense or on some analogous principle is inappropriate and inapplicable to the offence of desertion. Section 23 of the Act, it will be noticed speaks of condonation only in relation to the matrimonial offences of adultery and cruelty. Condonation involves: (i) an election by the injured spouse to affirm the marriage notwithstanding the condoned offence; and (ii) the possibility of revival of the condoned offence by any further matrimonial offence on the part of the guilty spouse.

It is the essence of the offence of desertion that the deserted spouse should all the time be affirming the marriage; otherwise desertion ceases and becomes separation by consent. There is thus no question of election

10 AIR 1957 SC 176; *Manglabai v Deorao* AIR 1962 MP 193; *Babu Ram v Kanta Devi* AIR 1990 J&K 1.

11 AIR 1964 SC 40, 48; *Dunn v Dunn* [1948] 2 All ER 822, 823; *Ashok Kumar v Prem Arora* AIR 1987 Del 255; *Jyoti Sarup v Lalita* AIR 1985 Del 491 (shifting of onus); *Mohinder Singh v Harbans Kaur* AIR 1992 P&H 8; *Harbans Singh v Chandra Prabha* AIR 2003 Raj 183.

on the part of the deserted spouse to affirm or disaffirm it. He or she has no option but to affirm. Further, the offence of desertion for a period of two years immediately preceding the presentation of the petition, once condoned, could never be revived, because the continuous period of desertion required by the statute would be irretrievably broken.¹² A spouse is not entitled to a divorce when in a petition for restitution of conjugal rights, the parties reconciled their differences and when the statutory period of two years was itself not completed, there was no question of condonation.¹³

DELAY

See notes under s 23.

CLAUSE (II): 'CEASED TO BE A HINDU BY CONVERSION'

As pointed out in § 441 (Vol I), there is no rule of Hindu law which forbids the subsistence of a marriage, one of the parties to which has ceased to be a Hindu. The marriage being indissoluble the rule was firmly established that conversion did not operate *per se* as a dissolution of marriage. The law was modified to some extent by the Native Convert's Marriage Dissolution Act 1866. The Hindu marriage under the Act is one solemnised between persons who are Hindus in the wide connotation of the term and the legislature has now laid down that the conversion of one of the spouses to any other religion affords a ground to the other spouse to seek dissolution to the marriage. The Note to the Hindu Marriage and Divorce Bill stated:

A change in religion is not inconsistent with the continuance of conjugal love and it should therefore not be permissible for a party to the marriage to get a divorce by changing his or her religion.

The right to get a divorce under this law is therefore, given to the party who continues to be a Hindu (in the wide sense in which the term is used). A somewhat similar right is given to a person changing his religion to Christianity under the Native Convert's Marriage Dissolution Act 1866, under which a husband or wife who changes his or her religion to Christianity is entitled to sue the other party for restitution of conjugal rights if the other party deserts or repudiates him or her, and if after the petition the desertion persists, the court may declare the marriage dissolved after following the prescribed procedure.

¹² *Perry v Perry* [1952] 1 All ER 1076, 1089; however *France v France* [1969] 2 All ER 870.

¹³ *Santosh Kumari v Shiv Prakash* AIR 2001 Del 376.

The term 'Hindu' in this clause must be understood in the wide sense given to it in s 2 which includes all Hindus, Buddhists, Jains and Sikhs. So a person continues to be a Hindu even though he may have been converted from any one to any other of these religions and his case will not be covered by this clause. Conversion in the present context implies that the person has voluntarily relinquished his religion and adopted another religion after formal ceremonial conversion. A Hindu does not cease to be a Hindu merely because he professes a theoretical allegiance to another faith, or is an ardent admirer and advocate of such religion and its practices. However, if he abdicates his religion by a clear act of renunciation and adopts the other religion by undergoing formal conversion, he would cease to be a Hindu within the meaning of this clause.

CLAUSE (III): '...INCURABLY OF UNSOUND MIND OR SUFFERING...MENTAL DISORDER...'

The notes on clauses to the Amendment Bill stated:

The ground relating to incurable unsoundness of mind can be relied on at present only if it has been there for a continuous period of not less than three years immediately before the presentation of the petition. This requirement regarding the minimum period is proposed to be dispensed with. Further this ground does not seem to cover cases where the mental disorder (continuous or intermittent) is of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent, as in the case of mental disorder: it is very difficult to predicate with certainty that it is incurable. This ground has, therefore, been suitably expanded.

'UN SOUND MIND'

The scheme of the Act on the question of mental capacity of the spouses affecting formation of marriage has been pointed out in the notes under s 5(ii). This clause deals with supervening unsoundness of mind and also mental disorder of the nature mentioned in the *Explanation* which has been added to the clause. The unsoundness of mind must be incurable though it is now necessary that it should have been present for any particular period before the presentation of the petition. The mental disorder must be of such a degree which mitigates against the continuance of the marriage.¹⁴

The meaning of the expression 'incurably of unsound mind' and the test applicable in any such case has been examined in a number of cases decided in England. It has been observed that the state of mind envisaged

¹⁴ *BN Panduranga Shet v SN Vijayalakshmi* AIR 2003 Kant 357.

is a degree of unsoundness or incapacity of mind properly called insanity. The practical test of the degree is to be found in the phrase 'incapable of managing himself and his affairs including the problems of society and of married life but without reference to the cause of such incapacity'.¹⁵

The onus of proving unsoundness of mind, as also that it is incurable is on the petitioner. The burden of proof in any case falling under this clause is cast firmly on the petitioner, so much so that it is sometimes said that the conscience of the court must be satisfied before a decree is passed.¹⁶ In any case, the onus would be a heavy one and the court must be satisfied on the point beyond all reasonable doubt (s 23).¹⁷ When medical evidence, contrary to allegations of mental illness is available a decree would not be passed on those grounds.¹⁸

It is not necessary that the respondent should have been adjudged a lunatic under the Lunacy Act. Nor does the finding of the court on the inquisition against the respondent afford proof of his unsoundness of mind. However, the finding of such court that the respondent is a lunatic is *prima facie* evidence and raises a presumption that he continued to be of unsound mind¹⁹ and throws the burden of proof on those who contend to the contrary. The presumption is not then, as it would otherwise be, in favour of sanity or soundness of mind, but the contrary must be proved;²⁰ ie those who allege the insanity of the respondent at the time of the petition, have the burden cast on them of proving such unsoundness of mind. Being in all cases a question of fact, it must depend upon the facts of each case whether there is satisfactory evidence of the unsoundness of mind of the respondent. There should be a strict inquiry into the matter and the court must be really satisfied that the requirements of this clause are established.²¹ The court insists on the test of legal insanity being satisfied by cogent and clear evidence to the effect that the respondent is unable to understand the nature and consequences of his acts and is such as cannot be regarded as

15 *Whysall v Whysall* [1959] 3 All ER 389, 395–97, *Robinson* [1964] 3 All ER 232, 239–40, *Bani Devi v Banerjee* AIR 1972 Del 50; *Kartik Chandra v Manjuran* AIR 1973 Cal 545.

16 *Pronub Kumar v Krishna* AIR 1975 Cal 109, 113 (schizophrenia); *Pramatha Maity v Ashima* AIR 1991 Cal 123 (parents of husband alleging unsoundness of mind—parents and doctors not examined—no decree).

17 *Sharada v Dharampal* AIR 2003 SC 3450.

18 *Devi Sharma v Chander Mohan* AIR 2003 P&H 327.

19 *Seshamma v Padmanabha Rao* (1971) 40 Mad 660.

20 *Snook v Watts* (1848) 11 Beav 105; *Hill v Clifford* [1907] 2 Ch 236, 244–45.

21 See s 23 and notes thereunder 'Standard of proof'. In *Dastane v Dastane* AIR 1970 Bom 312, the court considered the question of schizophrenia. As to schizophrenia the explanation to the now amended section includes it in mental disorder, *Rita Roy v Silesh Chandra* AIR 1982 Cal 138.

responsible for his acts in the eye of law.²² There is a difference between mental disorder, which is a ground for divorce and psychological depression, which is not specified in the section and therefore a decree of divorce granted on the ground of psychological depression cannot enure.²³

Decisions on the subject often turn on the peculiar facts and circumstances of each individual case. The question is to be determined not upon wire-drawn speculations but upon tangible and established facts. The question is a mixed one, partly within the range of common observation and partly within the range of medical experience. The gravity and importance of the issue requires that the court ought to form its own independent judgment on the point. Medical testimony can be of considerable assistance and even guidance but the question is one for the court and not for the experts and evidence of experts does not relieve the court from the obligation of satisfying itself on the point of unsoundness of mind.²⁴

There is no provision, which compels a wife to undergo medical examination.²⁵ A case of insanity would have to be established with cogent evidence that the insanity was incurable or that the mental disorder was of such kind and magnitude that it was not reasonably possible for the petitioner to live with the respondent spouse.²⁶

MINOR

A decree for dissolution of marriage passed against a minor without appointment of a guardian would be a nullity.²⁷

No decree would be granted on this ground if the unsoundness of mind had been conducted by the wilful neglect or misconduct of the petitioner and the court is satisfied that the petitioner is, in asking for relief, taking advantage of his or her own wrong.²⁸

'MENTAL DISORDER'

The amendment in this clause, confines the ground not only to what in legal terminology is strictly regarded as unsoundness of mind but expands the ambit of the ground so as to include mental disorder of the nature mentioned in the clause and connotation of which is given in the explanation to the same.

22 *Ajitrai Mehta v Vasumati* AIR 1969 Guj 48.

23 *Hema Reddy v Rakesh Reddy* AIR 2002 AP 228.

24 This passage is quoted with approval in *Munishwar Datt v Indra Kumari* AIR 1963 Punj 449, (1963) 2 Punj 263; *J Sudhakara Shenoy v Vrinda Shenoy* AIR 2001 Kant 1 [on facts and also on ground of delay (13 years) divorce declined].

25 *Smritikana v Dilip Kumar* AIR 1982 Cal 547.

26 *Ibid.*

27 *Asha Rani v Amrat Lal* AIR 1977 P&H 28.

28 See s 23 (1)(a).

Under s 12(d) of the Matrimonial Causes Act 1973, in England, a marriage is voidable, inter alia, on the ground of mental disorder as defined in Mental Health Act 1959. Section 4 of the Mental Health Act defines and gives a classification of mental disorder. The present clause substantially borrows the language of that section, but with certain variations. To bring a case within the ambit of the clause, it is not necessary that the disorder should be incurable. However, it must be of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. The burden of proving such mental disorder is in all cases on the party who seeks to rely on this ground. When allegations about such mental disorders are made and when evidence is available with the spouse making such allegations, the refusal of the spouse for examination by doctors may lead to an adverse inference.²⁹ Attention is invited to the decision of the High Court of Calcutta in *Smritikana v Dilip Kumar* (supra) where it has been held that there is no provision which compels the spouse against whom such an allegation is made, to undergo medical examination. The court must arrive at its own conclusion as to unsoundness or mental disorder. Even a certificate of a medical practitioner may not be sufficient to prove mental disorder.³⁰

‘...CONTINUOUSLY OR INTERMITTENTLY...’

To bring a case within the ambit of this clause it is not necessary that the mental disorder should be permanent or continuous. It may be even intermittent but it must be of the kind and the extent mentioned in the clause.

GROUND ALSO FOR JUDICIAL SEPARATION

As now expressly enacted in s 10(1), this clause also affords a ground for judicial separation. Under the unamended provision in s 10(1)(e), unsoundness of mind of the other party, if present for a period of not less than two years immediately preceding the presentation of the petition, was a ground for such relief. However, it was not necessary that the unsoundness of mind should be incurable for relief by way of a decree of divorce, however, a stronger ground had to be made out. The unsoundness of mind had to be incurable and had to be present for a continuous period of three years immediately preceding the presentation of the petition. The amending Act, as already pointed out, made considerable changes in the scope and ambit of this ground.

²⁹ *T Hari Kumar Naidu v Prameela* AIR 2001 AP 46 (divorce granted on adverse inference).

³⁰ *Sudhir Singhal v Neeta Singhal* AIR 2001 Del 116.

CLAUSE (IV): INCURABLE AND VIRULENT LEPROSY

This clause as amended now lays down as one of the grounds for decree by way of divorce that the respondent has been suffering from a virulent and incurable form of leprosy. Modern medical science has made significant progress in the treatment of this disease and with new drugs which are now used and new methods of treatment, the question whether in any particular case leprosy is virulent or not will have to be carefully considered when relief is sought on this ground.

Medical testimony can be of considerable assistance and even guidance but ultimately, the question is one for the court and not for the experts and, evidence of experts does not relieve the court from forming its own judgment and from the obligation of satisfying itself on the question whether leprosy from which the respondent suffers is both of a virulent form and incurable. The onus of proving this is on the petitioner. Reference may be made to the undermentioned case where a number of treatises on the subject were carefully examined by the Supreme Court.³¹

The expression 'virulent' was interpreted as malignant or venomous in the undermentioned case.³²

Sub-section (1)(iv) before its amendment, required that the respondent should have been suffering for a period of not less than three years immediately preceding the presentation of the petition from a virulent and incurable form of leprosy. No such period is now necessary to bring a case within the ambit of this clause. On the same facts and the same grounds, a petitioner can now seek relief also by way of judicial separation.

CLAUSE (V): VENEREAL DISEASE

This clause lays down as one of the grounds on which marriage may be dissolved by a decree of divorce that the respondent has been suffering from a venereal disease in a communicative form. Before its amendment in 1976, this ground required that the disease must have been there for a period of not less than three years immediately preceding the petition. The condition about the period has now been omitted. The right to enter into matrimony would, however be suspended till the person who has contracted a venereal disease is cured of the same. Such suspension of the right to marry is valid and cannot be enforced through legal process.³³

Although the clause does not say in terms that the disease must not have been contracted by the respondent from the petitioner, there can be no

³¹ *Swarajya Lakshmi v Padma Rao* AIR 1974 SC 165; affirming AIR 1970 AP 300 (lapromatus leprosy is virulent and incurable).

³² *Annapurnamma v Appa Rao* AIR 1963 AP 312.

³³ *X v Hospital Z* AIR 1999 SC 495.

doubt that the ground cannot be entertained if the respondent had the misfortune of contracting the disease from the petitioner. However, it is no defence to urge that the disease was innocently contracted or that it is curable. The ground is made out if it is shown that the disease is in a communicable form and it is not necessary that it should have been communicated to the petitioner.

The ground must be specifically pleaded. Question may arise as to the construction of 'in a communicable form'. Does it mean communicable to the other spouse or to the children that might be born of the marriage? Presumably, it means both.

'Venereal disease' as evidence of adultery or cruelty and as a ground for leaving the other spouse has been considered under those heads.

JUDICIAL SEPARATION

It will be noticed that this identical ground entitled the petitioner to ask for relief by way of judicial separation or divorce at her or his option.

CLAUSE (VI): ADOPTION OF RELIGIOUS ORDER

Under Hindu law, where a person enters into a religious order renouncing all worldly affairs, his action is tantamount to civil death (§ 111, Vol I). This clause lays down that a husband or wife can seek dissolution of marriage by a decree of divorce on the ground that the respondent has renounced the world by entering any religious order. Both these requirements must be satisfied before a decree for divorce can be granted on the ground laid down in this clause. The religious orders contemplated by the clause include those of Hindus, Buddhists, Jains and Sikhs. The religious orders well-known in India require on the part of a person who wants to enter the same, the performance of certain ceremonies or certain formalities. The religious order whatever it may be, should be one that requires renunciation of the world. This postulates relinquishment of all property and worldly concerns.

A person cannot be said to have adopted a religious order by merely declaring himself to belong to such order. He must have performed the requisite ceremonies and formalities of the particular religious order. Thus, for instance a person who wants to renounce the world by becoming a *sanyasi* can be held to have entered that order only if he has performed the necessary rites and ceremonies prescribed by the *shastras*. The mere fact that he calls himself or is described by others as such is not enough; and the mere adoption of the external symbols of *sanyasa* as the wearing of coloured clothes or shaving of the head, is not sufficient to make him a *sanyasi*. The renunciation of the world which is a postulant for *sanyasa* requires relinquishment of all property and worldly affairs. Relinquishment

of property need not be in favour of any particular person but may be in a general way. Renunciation of the world by entering into a religious order must be unequivocal and absolute.³⁴

CLAUSE (VII): 'HAS NOT BEEN HEARD OF AS BEEN ALIVE FOR A PERIOD OF SEVEN YEARS...'

It is a rule of presumption that in the absence of evidence to the contrary, a person shall be taken to be dead if he has not been heard of for a period of seven years or more by those persons who would naturally have heard of him, had he been alive. This is a presumption of universal acceptance as it aids proof of death in cases where it would be extremely difficult, if not impossible, to prove that fact. It is a presumption of great convenience and s 108 of Evidence Act lays it down as a distinct rule. The fact that for a period of seven years or upwards the respondent has been absent from the petitioner and the petitioner or other persons who would hear of him had he been alive, have not heard of him at all should in normal circumstances be sufficient evidence in which death may be presumed and dissolution of marriage granted to the petitioner. That presumption is the foundation of the rule laid down in this clause and, although the clause does not in terms require the court to make in any such case a 'decree of presumption of death and of a dissolution of marriage' as laid down in England, it does not seem that the legislature intended to enact any different rule. The standard of proof is laid down in s 23 and the court will inquire into all the relevant facts and circumstances and pass a decree only if it is satisfied that reasonable grounds exist for acting on the presumption of the death of the respondent. The rules framed under the Act by some of the High Courts require the petitioner to state in any such case, the last place of cohabitation of the parties, the circumstances in which the parties ceased to cohabit, the date and the place where the respondent was last seen or heard of, and the steps which were taken to trace the respondent.³⁵

The object of the rule is not to establish whether in point of fact the respondent was dead or alive, but whether, on the day on which the decree is passed, the facts so far as then known, were such as to justify the court in taking action on the ground set out in the clause. Therefore, a decree of divorce granted under this clause is valid and effective even if it subsequently transpires that the respondent was in fact alive when the decree was passed.

³⁴ *Kondol Row v Swamulavaru* AIR 1918 Mad 402; *Baldeo Prasad v Arya Priti Nidhi* (1930) 52 All 789.

³⁵ For instance, see r 8 (vii)(b) of the Rules of the Patna High Court; *Parkinson v Parkinson* [1939] 3 All ER 108.

SUB-SECTION (1A)(I): WHERE THERE HAS BEEN NO RESUMPTION OF COHABITATION FOR ONE YEAR OR MORE AFTER DECREE FOR JUDICIAL SEPARATION

The newly-added³⁶ cl (i) of sub-s (1A) made a distinct departure from the original cl (viii) of sub-s (1). Under the original provision relief by way of divorce on the ground therein mentioned could be obtained only by a petitioner, husband or wife, who had obtained a decree for judicial separation. The present clause permits either party to that petition in which a decree for judicial separation had been passed to apply to the court for a decree for divorce by showing that there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards after passing of the decree. The decree must of course, be a subsisting decree and no relief will be granted under this clause if it had been rescinded by the court under s 10(2).

In the undermentioned case, it was held that the amendment made by the 1964 Act is prospective and not retrospective in its operation.³⁷

The scheme of the Act, as already pointed out, is to discourage divorce, but without enforcing conditions which may cause hardship or drive parties to act in collusion with one another. In fixing the period of one year, the legislature seems to have taken the view that there should be scope for opportunities of mutual adjustment after a decree for judicial separation. At the same time, the view seems to have been taken that in case where the parties have not resumed cohabitation for a period of one year or more after any such decree, the marriage must be regarded as having proved a complete failure or having broken down and not only the party, husband or wife, who obtained the decree but either party should have the right to ask for dissolution of marriage. The court will in case of such an application, grant dissolution of marriage in the absence of any bar laid down in s 23 disentitling the petitioner from seeking this relief.

The relief for dissolution of marriage by a decree of divorce, specified in either of the cl (i) and (ii), sub-s (1A) to this section cannot be obtained in the same proceedings in which the decree for judicial separation or restitution of conjugal rights has been passed. A fresh petition would have to be instituted on either of the same grounds after the decree in the earlier proceedings has become final.³⁸

The effect of this clause would seem to be that where the period of one year or more has expired after the passing of the decree for judicial separation, it would be irrelevant and unnecessary to examine whether one

³⁶ See 'Amendments'.

³⁷ *Raghubir Singh v Satpal Kaur* AIR 1973 P&H 117.

³⁸ *Sadan Singh v Resham* AIR 1982 All 52.

or the other spouse has been responsible for not resuming cohabitation after the passing of the decree. The mere fact that the spouse who obtained the decree or the spouse against whom the decree had gone had not expressed desire or willingness to resume cohabitation or even had been opposed to or declined offer of resumption of cohabitation would not be a ground for refusing relief to him or her under this clause, for granting relief even to such spouse would *inter alia* seem to be the purpose of the rule.

The clause, however, does not confer an absolute and unrestricted right on a party to obtain a decree for divorce. As laid down in s 23, the court has to be satisfied that the ground for relief exists and it has also to be satisfied that to grant such relief there is no bar of any kind mentioned there. Thus for instance, the court will decline to grant a decree for divorce in any such case if it is satisfied that the petitioner is taking advantage of his or her own wrong when seeking such relief. The conduct of the petitioner spouse may be of such grave and weighty character as would disentitle the petitioner spouse to any relief under this clause. As a general rule, the conduct which would disentitle the petitioner spouse to such relief would have to be subsequent to the passing of the decree for judicial separation, though there may be exceptional cases where even conduct prior to that may become relevant. This question of taking advantage of one's own wrong would ordinarily arise in case of a spouse against whom the decree for separation had gone, though it is conceivable that the bar may apply in the facts and circumstances of a particular case to the spouse who had obtained the decree for judicial separation. The reason underlying the rule being that relief should be granted to either spouse under this clause where the marriage can be regarded as having completely failed or broken down, the conduct which may disentitle a party from seeking relief must be such as can only be regarded as a grave and weighty matter. (See notes under sub-s (1A)(ii). Reference may be made to s 23 and notes under it.)

There is nothing irrevocable in a decree for judicial separation and it always leaves time and opportunity to the parties for reconsideration. So if the parties have resumed cohabitation after a decree of judicial separation, it would not be open to the party who had obtained that decree to claim relief under the present clause. Cohabitation means living together as husband and wife. It consists of the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband supporting his wife as a husband should. Cohabitation does not necessarily depend on whether there is sexual intercourse between husband and wife. If there is sexual intercourse, it is very strong evidence—it may be conclusive evidence—that they are cohabiting, but it does not follow that because they do not have sexual intercourse, they are not cohabiting.³⁹ Cohabitation implies something

³⁹ *Thomas v Thomas* [1948] 2 All ER 98–99, [1948] 2 KB 294; *Evans v Evans* [1947] 2 All ER 656, [1948] 1 KB 175.

different from mere residence. It must mean that the husband and wife have begun acting as such and have resumed their status and position as husband and wife.

‘FOR A PERIOD OF...OR UPWARDS AFTER THE... DECREE’

The period mentioned in the clause would commence from the date of the passing of the decree by the court of first instance and the same would be the date of commencement of the period when there is an appeal and the decree is confirmed. Where, however, the court of first instance has dismissed the petition and in appeal, a decree for judicial separation has been passed, the period would commence from the date of the decree of the appellate court.⁴⁰ The appellate court has in such a case no power to antedate its decree.⁴¹

When a decree for judicial separation was passed and remained unchallenged for one year and a divorce was granted, an appeal by the wife on the ground that she did not join the husband as he was living with another lady was not liable to be countenanced as no such issue was framed nor raised by the wife.⁴²

Consent Decree

See notes under s 23.

In the undermentioned case,⁴³ in a petition for divorce, the parties obtained a consent decree for judicial separation and subsequently, an application for divorce was made under the present clause. The application was dismissed by the High Court on the ground that the decree for judicial separation must be regarded as without jurisdiction since it had been passed without proving any of the grounds mentioned in s 10 and was in violation of the mandatory requirements of s 23(1).

SUB-SECTION (1A)(II): WHERE THERE HAS BEEN RESTITUTION OF CONJUGAL RIGHTS

The newly added cl (ii) of sub-s (1A) made a distinct departure from the original cl (ix) of sub-s (1). Under the original provision, relief by way of

⁴⁰ Quoted with approval in *Smriti Banerjee v Tapan Kumar Banerjee* AIR 1986 Cal 284, 288.

⁴¹ *Kripalani v Kripalani* AIR 1960 Bom 447; *Chander Prakash v Sudesh Kumari* AIR 1971 Del 208 (the court applied the maxim *actus curiae neminem gravabit* and granted a decree for divorce under this clause); *Motilal v Padmaben* AIR 1982 Guj 254; *Gomathi v Kumaragurukaran* AIR 1987 Mad 259.

⁴² *V Sreedevi v V Varadarajan* AIR 2001 Mad 1.

⁴³ *Hirakali v Awasthi* AIR 1971 All 201.

divorce on the ground therein mentioned could be obtained only by a petitioner, husband or wife, who had obtained a decree for restitution of conjugal rights. The present clause permits either party to that petition in which a decree for restitution of conjugal rights had been passed to apply to the court for a decree for divorce by showing that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of the decree.'

The scheme of the Act, as already pointed out, is to discourage divorce, but without enforcing conditions which may cause hardship or drive the parties to act in collusion with one another. In fixing the period of one year, the legislature seems to have taken the view that in a case where, even after the decree there has been no restitution of conjugal rights, not only the party, husband or wife, who obtained the decree but either party should have the right to ask for dissolution of marriage. The court will, in case of such an application, grant dissolution of marriage in the absence of any bar laid down in s 23 disentitling the petitioner from seeking this relief. Thus for instance, the court will not grant a decree for divorce in any such case if it is satisfied that the petitioner before it is taking advantage of his or her own wrong when seeking such relief.

The effect of this clause would seem to be that where a period of one year or more has expired after passing of the decree for restitution of conjugal rights and there has been no restitution of conjugal rights, it would be necessary for the court to examine whether the one or the other spouse has been responsible for non-compliance with the decree for restitution. The mere fact that the husband or wife against whom the decree had been passed was responsible for non-compliance of the decree would not per se be a ground for refusing relief to him or her under his added clause, for granting relief to such defaulting spouse would, inter alia seem to be the very purpose of the rule.

The clause, however, does not confer an absolute or unrestricted right on a party to obtain a decree for divorce in any such case. The conduct of the petitioner-spouse may be of such grave and weighty character as would disentitle the petitioner spouse to any relief under this clause. As a general rule, the conduct which would disentitle the petitioner spouse to such relief would be subsequent to the decree of restitution though there can be exceptional cases where even conduct prior to that may become relevant. This question of taking advantage of one's own wrong would ordinarily arise in case of a spouse against whom the decree for restitution had gone, though it is conceivable that the bar may apply in the facts and circumstances of a particular case to the spouse who had obtained the decree for restitution. Whether the conduct of the petitioner-spouse in a case falling under this clause would bring the case within the mischief of s 23(1)(a), must depend on the facts and circumstances of each particular case and it is not possible to expect any general or exhaustive statement of what may or may not

constitute 'wrong' within the ambit of the rule there laid down. However, it is submitted that in any case the conduct must be grave and weighty.

There was some conflict of judicial opinion on this subject. In *Laxmibai v Laxmichand*,⁴⁴ it was held that the deliberate non-compliance of the decree of restitution by the husband against whom the decree had gone was defiance of that mandate of the court and the husband was not permitted any relief under this clause. In the undermentioned decisions of *Ram Kali v Gopal Das*⁴⁵ and *Bimla Devi v Singh Raj*,⁴⁶ the view was taken that non-compliance by the husband of a decree of restitution would not constitute a wrong within the meaning of s 23(1)(a) and that the husband could seek relief under this clause. The court accepted the principle of the breakdown of the marriage and also expressed the view that s 23(1)(a) should be so construed that it operates in harmony with the present clause. It is submitted that any relief under this clause would have to be construed and moulded, keeping in mind the fact that it would have to be in harmony with s 23(1)(a). Breakdown of a marriage would not per se be an independent ground for dissolution. Decrees under s 13 have been passed, if it is found that the matrimonial offence complained of is established, coupled with the fact that there is a complete breakdown of the marriage, which is irretrievable and irreversible, and which prevents the parties from staying together as man and wife. However, when breakdown of a marriage is pleaded, the court would have to go into the seriousness of the actual matrimonial offence. The irretrievable breakdown must therefore, be actual and not an attempt by the spouse so as to facilitate and pre-empt the passing of a decree, which may be construed as a 'wrong' if the facts so establish. This clause has to be read harmoniously with s 23 (1)(a). The 'wrong' contemplated in the latter provision must be something much more than deliberate non-compliance with the decree. The conduct of the petitioner spouse must be of such grave and weighty character, as in the opinion, of the court should disentitle such spouse from getting the relief. This is evident from the decisions of the Supreme Court in *Dharmendra Kumar v Usha Kumar* and *Hirachand Srinivas Managaonkar v Sunanda* cited infra.

The Supreme Court has subsequently⁴⁷ expressed the view that the Full

44 AIR 1968 Bom 332; *Madhukar v Sarala* AIR 1973 Bom 55; *Jetthabhai v Manabhai* AIR 1975 Bom 88; *Santosh Kumari v Kewal Krishan* AIR 1985 Del 393.

45 (1971) 1 ILR Del 6 (FB). Reference may be made to an article by Deshpande J, in AIR 1971 Jour p 113; *Gajna Devi v Pursotam Giri* AIR 1977 Del 178; *Anil v Sudhaben* AIR 1978 Guj 74.

46 1977 AIR P&H 167 (FB); *Santosh Kumari v Mohanlal* AIR 1980 P&H 325; *Jaswinder Kaur v Kulwant Singh* AIR 1980 P&H 220; *Soundarammal v Sundara Mahalinga* AIR 1980 Mad 294; *Mita Gupta v Prabir Kumar Gupta* AIR 1989 Cal 248.

47 *Dharmendra Kumar v Usha Kumar* AIR 1977 SC 2218; *Ramesh Chander v Saroj Kumari* (1979) 81 PLR 198; *Banti Devi v Moti Ram* AIR 1990 HP 35 (see discussion in s 23(1)(a) also)

Bench case of the Delhi High Court had been correctly decided and held that the spouse against whom the decree for restitution has gone should not be deprived of relief under this provision on the ground of non-compliance with the same, unless such spouse is guilty of a 'wrong' amounting to serious misconduct within the meaning of s 23(1)(a). The section, however, cannot be altogether taken out of the purview of s 23(1)(a). Where after a decree for restitution of conjugal rights in favour of the wife, the husband not only did not comply with the decree but ill-treated her and finally drove her out of the house, it was held that he was not entitled to any relief under the amended sub-section.⁴⁸ When an appeal against a petition for restitution of conjugal rights failed, a subsequent petition for divorce would not be maintainable.⁴⁹ When, after the passing of a decree of judicial separation on the ground of adultery, there is still further persistence with the adulterous liaison, despite the decree, it cannot be said that the offence of adultery is obliterated with the passing of such a decree. The decree of judicial separation in no way puts to an end the matrimonial relationship, it only results in suspension of the marital ties. To say that the offence alleged has been obliterated would defeat the very purpose and laudable object in passing the decree, since the continuation of the adulterous liaison is a continuing matrimonial offence.⁵⁰ The right to claim a divorce under this section is not absolute and unqualified. Any proceedings under this Act are governed by s 23 and courts are under a duty to decree the relief sought for, only if the conditions mentioned in sub-s (1A) of s 13 are satisfied as is mentioned supra, qua this section having to be construed harmoniously with s 23.⁵¹

This sub-section which was introduced by the amendment of 1964, confers the right to claim divorce on either party to a marriage, as against the right to apply for divorce which was earlier by virtue of the pre-amended section, restricted to the party which had obtained the decree of judicial separation or restitution, so that a petition can be filed not only by the party which had obtained a decree of judicial separation or for a restitution, but is also by the party against whom the decree was passed.

When a spouse is granted a decree for judicial separation, the same remaining unchallenged by the other spouse, the grant of a divorce subsequently, will not, however, bring such proceedings within the ambit of s 23(1)(a), as the spouse in whose favour the decree has been passed cannot be said to have taken any such advantage, as filing of such further

48 *Geeta Lakshmi v Sarweswar Rao* AIR 1983 AP 111; *KS Lalithamma v NS Hiriyannaiiah* AIR 1983 Kant 63; *Murahari Rao v Vasanta Manohari* AIR 1984 AP 54; *OP Mehra v Saroj Mehra* AIR 1984 Del 159.

49 *Srikant v Saroj* AIR 2001 MP 94.

50 *Hirachand Srinivas Managaonkar v Sunanda* (2001) 3 JT 620 (overruling *Baimani v Jayantilal Dahyabhai* AIR 1979 Guj 209 and approving *Soundrammal v Sundra Mahalinga Nadar* AIR 1980 Mad 294).

51 *Archana v PK Tomar* AIR 2003 All 214.

proceedings, would fall within the statutory right of divorce available to the successful spouse, and not a 'wrong' as contemplated in that section.⁵²

'For a period of one year...or upwards after the...decree'

See notes under the same heading above.

Consent Decree

See notes under s 23.

SUB-SECTION (2): HUSBAND HAVING MORE THAN ONE WIFE ALIVE: MARRIAGES SOLEMNISED BEFORE COMMENCEMENT OF THE ACT

Sub-section (1) provides for a decree of divorce dissolving a marriage, solemnised whether before or after the commencement of the Act, at the instance of either party, on the various grounds specified in it. In addition to those grounds, a wife can seek dissolution of her marriage on the ground that the husband has, at the time of the presentation of the petition, another wife who is alive. This ground can obviously exist only in case of any marriage solemnised before the Act came into operation. With the coming into operation of the Act, monogamy has become the rule and a bigamous marriage, if contracted after the coming into force of the Act, would be null and void as laid down in s 11 read with s 5(i) and no question can arise of dissolution of a marriage, which was void *ab initio*. A somewhat anomalous position was, however, bound to remain in case of more than one marriage contracted by the husband prior to the coming into force of the Act. Such marriages could validly take place under the former system of law, which recognised polygamy, and therefore, the legislature has enacted in this sub-section that in case of any such marriage, the wife should have the right to seek dissolution of her marriage. A petition for dissolution of the marriage by divorce can be maintained by a wife in case of any marriage solemnised before the commencement of the Act on the ground of the husband having another wife, irrespective of the fact that the other marriage had taken place after or before the marriage of the petitioner with him, provided the other wife is alive at the time of the presentation of the petition. As a general rule, in any such case, the conduct or disability on the part of the petitioner wife cannot be relied on by the husband⁵³ unless, of course, he can establish that she is taking advantage of her own wrong or disability for

⁵² *V. Sreedevi v V. Vardarajan* AIR 2001 Mad 1 (non-framing of issue about husband living with another lady after judicial separation).

⁵³ *Gulab Kaur v Gurdev Singh* AIR 1963 Punj 493.

the purpose of such relief.⁵⁴ The mere fact that after the filing of the petition the husband has divorced the other wife is no ground for dismissing any such petition.⁵⁵ The Bombay Hindu Divorce Act (22 of 1947), which is now repealed, contained a provision which, though not *in pari materia* with the present sub-section, enabled a first wife to sue for divorce on the ground that her husband had married again before the coming into operation of that enactment. In a case decided under that enactment⁵⁶ the first wife had continued to live with the husband for 10 years after a second marriage and had children born of him after the second marriage. Her petition for divorce on the ground of the second marriage was resisted by the husband on the ground of condonation⁵⁷ and it was also contained that on the facts of the case it would be inequitable to grant a decree for divorce to her. Both the pleas were rejected. The Bombay Act did not permit of delay being pleaded in bar of the relief. Under the present sub-section, it would be competent to the court and even necessary and incumbent on it to consider whether there was any unnecessary or improper delay in instituting the proceeding as laid down in s 23(1)(d).⁵⁸

BIGAMOUS MARRIAGE

Where the husband has gone through ceremony of a second marriage after the commencement of this Act the case would not fall under this clause but such a marriage would be a nullity and the first wife can get dissolution of marriage under sub-s (1)(i) of this section.⁵⁹

SUB-SECTION (2)(II)

In addition to the grounds mentioned in sub-s (1) and cl (i) of sub-s (2), a wife can seek divorce on the ground that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality. It is not necessary that the husband should have been convicted of any of these offences in any criminal proceedings. Attempt to commit any of these offences is not, however, a ground for divorce.

A wife can sue for divorce if the husband has, since the solemnisation of

⁵⁴ *Ishwar Chander v Pomilla* AIR 1962 Punj 432.

⁵⁵ *Naganna v Lachmi Bai* AIR 1963 AP 82; *Thenku Veeriah v Tamisetti Nagiah* AIR 1959 AP 547 (FB).

⁵⁶ *Chandrabhagabai v Rajaram* (1955) 57 Bom LR 946.

⁵⁷ *Deepo v Kedar Singh* AIR 1962 Punj 183.

⁵⁸ Quoted with approval in *Lakshmi Ammal v Alagiriswami* AIR 1975 Mad 211-12; *Ninnoo v Nikka Ram* AIR 1968 Del 260 (delay of 11 years after the Act came into force explained); *Lalithamma v Kannan* AIR 1966 Mys 178 (delay held, not culpable or improper).

⁵⁹ *Gilabai v Fatto* AIR 1966 MP 130.

the marriage, been guilty of any of the unnatural offences mentioned in this clause. The offences are committed by having carnal intercourse against the order of nature with any man, woman or animal. Coitus *per os* is a criminal offence punishable under s 377 of the Indian Penal Code; but as already pointed out above, it is necessary that the husband should have been convicted of any of the offences mentioned in this clause. The IPC makes it an offence on the part of persons of either sex who commit an unnatural offence but under the present clause, the matrimonial offences under this head are confined only to the case of the husband.⁶⁰

As to standard of proof see notes under s 23 and the undermentioned case.⁶¹

SUB-SECTION (2)(III)

This clause was added by the Amending Act of 1976. It provides an additional ground to the wife to seek divorce if a period of one year has elapsed after passing of an order or decree awarding maintenance to the wife under the Hindu Adoptions and Maintenance Act 1956 or under s 125 of the Code of Criminal Procedure 1973, and there has not been any reconciliation between the parties during that period.

SUB-SECTION (2)(IV)

This clause was added by the Amending Act of 1976. It confers on girls who have been married before attaining the age of 15 years, a right of repudiation. However, the right must be exercised before attaining the age of 18. The *Explanation* to the clause enacts that it applies whether the marriage was solemnised before or after the commencement of the amending Act. The repudiation also may be made before the girl has attained the age of 18.⁶² The clause only gives a right of repudiation as therein mentioned but the petition for dissolution of marriage on this ground is maintainable by her after completing 18 years of age.⁶³ There was no such right prior to the Amendment. [See notes under s 5(iii).]

RECOGNITION TO DIVORCE DECREES OF FOREIGN COURTS

Whether an Indian court is bound to accord recognition to divorce decrees granted by foreign courts is an issue touching the jurisdictional aspects of

60 *Gardner v Gardner* [1947] 1 All ER 630.

61 *Lauson v Lauson* [1955] 1 All ER 341; *Statham v Statham* [1929] P 131. *Revamma v Suseelamma* AIR 1967 Mys 165.

62 *Jiviben v Dabhyalal* AIR 1984 Guj 6.

63 *Bathula Iylaish v B Devamma* AIR 1981 AP 74.

the applicability of private international laws as recognised in India coupled with the tests of conclusiveness and the exceptions carved out as per s 13 of the Code of Civil Procedure 1908. If the exceptions set out in s 13 of the Code are attracted, the decree would not be conclusive.

The principles governing recognition of foreign judgment in cases of matrimonial disputes have been laid down by the Supreme Court in the case of *Y Narasinha Rao v Y Venkatalakshmi* where the court held that the grounds on which the relief is granted must be in accordance with the matrimonial law under which the party are married and the assumption of jurisdiction by the court. The exception to the rule being (1) where the matrimonial action is filed within the jurisdiction that the respondent is domicile or habitually and permanently resides and the relief is granted in accordance with the matrimonial law under which the party are married. (2) where the respondent submits to the jurisdiction of the court and contests the claim which is based on a ground under the matrimonial law of the parties and (3) where the respondent consents to the grant of relief despite the fact that the jurisdiction of the forum is not in accordance with the matrimonial law of the parties.⁶⁴

For a detailed analysis of the conclusiveness of foreign judgments as regards divorce proceedings, the observations of the Supreme Court will be found useful.⁶⁵

REMARriage AFTER DECREE FOR DISSOLUTION OF MARRIAGE

If a party to the proceedings remarries after the disposal of divorce proceedings but during the pendency of an appeal, such party does so at a risk as, if such appeal were to be allowed and the decree of divorce set aside, the second marriage would be jeopardised as being void.⁶⁶

Ex parte Divorce

The court can pass an ex parte decree of divorce, given the circumstances of the case, but on the other spouse showing sufficient cause or cogent reasons for setting aside the ex parte decree the court may set aside the same.⁶⁷ Section 21 of this Act states that proceedings under this Act are regulated by the provisions of the Code of Civil Procedure 1908. Taking this into consideration, it has been held by the Andhra Pradesh High Court that

⁶⁴ *Y Narasinha Rao v Y Venkatalakshmi* (1991) 3 SCC 451. Also see *Anubha v Vikas Aggrawal* AIR 2003 Del 175.

⁶⁵ *Satya v Teja Singh* AIR 1975 SC 105; *Veena Kalia v Jatinder Nath Kalia* AIR 1996 Del 54.

⁶⁶ *Savitri Pandey v Prem Chandra Pandey* AIR 2002 SC 591. See notes under s 15.

⁶⁷ *Anita Singh v Laxmi Narayan Singh* AIR 1992 SC 1148.

in circumstances where the husband has obtained an ex parte divorce, and the application of the wife for setting aside such a divorce is pending, the death of the husband during the pendency of such an application, will not disentitle the wife to bring the heirs of the husband on record, and the proceedings will not abate. The reasoning adopted by the court was that, if the wife were successful in having the decree set aside, she would be entitled to property and succession to her husband's estate, she being a Class I heir under the Hindu Succession Act. It has also been held that the principle of *actio personalis cum moritur persona* was not attracted.⁶⁸ The Karnataka High Court has taken a similar view, whereas the High Courts of Andhra Pradesh, Madras and Calcutta have expressed a contrary view.⁶⁹ There is thus a conflict of judicial opinion as regards the issue of continuance of ex parte proceedings and the implications thereon in the above circumstances.

This controversy is now put at rest with the decision of the Supreme Court.⁷⁰ The court has held that proceedings for setting aside the ex parte decree, in the eventuality of the husband's death, on bringing the heirs of the husband on record, are maintainable. The views expressed by the High Courts of Madras, Andhra Pradesh, Calcutta, Punjab⁷¹ are incorrect and those of the Bombay, Andhra Pradesh and Karnataka High Courts lay down the correct law as affirmed by the Supreme Court.

The above case was one where an ex parte decree had been passed, and the right of the aggrieved spouse to challenge the same was recognised. However, in that case, the court held that, since the marriage tie had been severed by the death of one of the spouses, the proceedings had abated. The right to sue for divorce, being a personal right, cannot be continued by a legal representative of a deceased spouse. Such proceedings would abate on the death of a spouse.⁷²

TRANSFER OF CASES

Apart from the powers of the court under s 21A to transfer petitions in certain cases, the court may also use its inherent powers to do so. It appears that in the undermentioned cases,⁷³ the Supreme Court directed transfer of the cases in exercise of its extraordinary powers and jurisdiction.

⁶⁸ *Vadalasetti Samrajyamma v Nagamma* AIR 1991 AP 13; *Irappa v Shivappa* AIR 1987 Kant 241.

⁶⁹ *Sunanda v Venkat Subbarao* AIR 1957 AP 424; *Saraswathi Ammal v Lakshmi* AIR 1989 Mad 216; *Butterfield v Butterfield* AIR 1923 Cal 426.

⁷⁰ *Yallawwa v Shantawwa* AIR 1997 SC 35

⁷¹ *Bhan Kaur v Isher Singh* AIR 1959 Punj 553

⁷² *Kimti Lal v Indu Kundra* AIR 1999 Del 325.

⁷³ *Mona Goel v Aresh Goel* AIR 2000 SC 3512; *Lalita Ranga v Ajay Ranga* AIR 2000 SC 3406; *Minni Kumar v Shaulendra Chaudhary* AIR 2000 SC 3505 (in all cases, orders for transfer of petitions made on the facts of each case).

13A. Alternate relief in divorce proceedings.—In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except insofar as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.

ALTERNATE RELIEF: JUDICIAL SEPARATION INSTEAD OF DIVORCE

Under the Act as now amended in 1976 (s 10(1)), the grounds on which a decree for judicial separation may be passed are identical to that required in respect of a decree for divorce. A petitioner, therefore, may on the same facts and same grounds seek relief under s 13 or instead may ask only for relief by way of judicial separation. In respect of grounds mentioned in cll (ii), (vi) and (vii), the court would grant relief by way of divorce, if the court is satisfied that the grounds are fully established. These are conversion to another religion, adoption of other religious order and respondent not being heard of as alive for seven years. In respect of the other grounds for divorce contained in s 13, the court has a discretion to grant a decree for judicial separation instead. As will be seen from s 23, the court is bound to grant relief if the grounds for granting the same are established, unless of course any of the absolute bars mentioned in s 23(1) are present. There is, under the Act, no general discretion vested in the court to withhold relief. However, in a petition for divorce, the court is vested with a discretion in respect of the grounds for divorce (other than those mentioned in cll (ii), (iv) and (vii) of s 13) and even though the ground for relief is established, it may, having regard to the facts and circumstances of the case, grant relief only by way of judicial separation. Having regard to the totality of the facts and all relevant features of the case, the court may reach the conclusion that it would be fair and just to the parties or even to either of them or in the interest of any child of the marriage or in the interest of justice that such discretion should be exercised. The discretion envisaged under this section is only to grant the alternative lesser relief in a petition for divorce where a requisite ground under s 13 is established. The discretion, of course, would be exercised on sound and established principles.⁷⁴

⁷⁴ *Angrez Kaur v Baldev Singh* AIR 1982 P&H 339; *Snigdha Devi v Akhil* AIR 1992 Gau 95 (grounds for divorce not made out: decree of judicial separation cannot be granted); *Madhu Sood v Anil Kumar Sood* AIR 1999 HP 17.

13B. Divorce by mutual consent.—(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than 18 months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

DIVORCE BY MUTUAL CONSENT

This section was introduced by the Amending Act of 1976. The Special Marriage Act 1954, contains a provision which is *in pari materia* with this newly-added section.

The requirements of the section are:

- (i) There must be a petition jointly presented to the court by both the parties to the marriage.
- (ii) The grounds for dissolution of the marriage by a decree for divorce must clearly and categorically show:
 - (a) that the parties have been living separately for a period of one year or more before the presentation of the petition;
 - (b) that they have not been able to live together; and
 - (c) that they have mutually agreed that the marriage should be dissolved.

The granting of the decree in a properly presented petition as above is not a matter of discretion with the court, but the court shall pass a decree—subject to the provisions of the Act—and after following the procedure and in the manner prescribed by sub-s (2). These are:

- (i) Both the parties must apply to the court not earlier than six months of the presentation of the petition and not later than 18 months after that date that the petition may be heard and decree dissolving the marriage may be granted;

- (ii) the court must give a hearing to the parties;
- (iii) the court may make such inquiry into the correctness of the grounds set out in sub-s (1);
- (iv) the court must thereafter be satisfied that the marriage of the parties had been solemnised after the Act came into force in 1955 and that the averments in the petition are true.⁷⁵

When all the ingredients are proved, a decree of divorce cannot be refused.⁷⁶

PETITION BY BOTH THE PARTIES TOGETHER

It is abundantly clear that the petition for divorce by mutual consent must be presented to the court jointly by both the parties and not by one party, stating that the other party to the marriage has given his or her consent to the dissolution of the marriage by a decree of the court. The motion before the court for hearing of the petition should also be by both parties. The court will not proceed to do so, unless both the parties at that stage want that the marriage should be dissolved. In the undermentioned case, however, a different view has been taken.⁷⁷ It would be open to either party at any time, till passing of the decree, to withdraw the petition. Ofcourse, it would be open to both the parties together also to withdraw the petition. In any such case there can be no question of the court passing any decree of divorce.

According to the Madhya Pradesh High Court, even a joint petition for restitution of rights or in the alternative for divorce is not barred.⁷⁸

As mentioned herein, one of the parties or both can withdraw consent for mutual divorce. Consent once given cannot be treated as irrevocable.⁷⁹ However, the absence of one spouse cannot impute a retraction of the consent, when there is no specific withdrawal.⁸⁰

This section, therefore contemplates two steps to be taken for proceeding under this provision, the first step being the separation of both the parties for a period of one year and the second being the consent of both the parties when the court is moved on a motion after the period of six months stipulated in the section. This is so since the court cannot be said to be

⁷⁵ *Ravishankar v Sharda* (1977) MLJ 784 (court cannot insist on any additional requirement).

⁷⁶ *Leela Joshi v Mahdeo* AIR 1991 Bom 105; *Harish Kumar v Anita* AIR 2003 MP 197.

⁷⁷ *Jayashree v Ramesh* AIR 1984 Bom 302. There is divergence of views on this point but see *Harcharan Kaur v Nanchhatdar Singh* AIR 1988 P&H 27.

⁷⁸ *Bhavana Adwani v Manohar* AIR 1992 MP 105.

⁷⁹ *Sureshta Devi v Om Prakash* AIR 1992 SC 1904; overruling *Jayshree v Ramesh* AIR 1984 Bom 302; *Chandrakanta v Hans Kumar* AIR 1989 Del 73; *Meena v Anirudh Datta* (84) 2 DMC (388) (MP).

⁸⁰ *Suman v Surendra Kumar* AIR 2003 Raj 155.

seized of jurisdiction, unless both parties consent at the time of inquiry before the court. It is only consent which vests the court with jurisdiction under this provision.⁸¹ When circumstances under which a divorce can be granted under the section are enumerated, a decree of divorce cannot be granted when the conditions are not satisfied.⁸²

In *Sureshta Devi's* case, the court had expressed the view that, mutual consent should inure till the decree of divorce is passed, if consent is not withdrawn in the interregnum. This view expressed by the Supreme Court has not been indorsed by a later Bench of the court.⁸³ The court held that the observations of the earlier Bench that consent should ensue till the culmination of divorce proceedings were too wide, and that those observations ran counter to the language employed by the legislature in s 13B(2). The Bench has urged a reconsideration of the earlier view.

‘...HAVE BEEN LIVING SEPARATELY’

It is not necessary that the parties must be living in different places. What the expression would seem to require is that they must be living apart, ie, not living with each other as husband and wife. There can be cases where the parties may have been compelled to live in the same house or premises and yet can be rightly said to be living separately. This may be due to force of circumstances. The separation can be consensual or otherwise.⁸⁴

‘...NOT BEEN ABLE TO LIVE TOGETHER’

Living separately or not being able to live together cannot of course mean that it could be at the mere whim or mere volition of the parties. The averments and facts of the case must be such that the court would be satisfied that it was impossible for the parties to live together as husband and wife, and had infact been living separately for the statutory period of one year or more.⁸⁵ Both the above terms have to be read in conjunction, and a duty is thereby cast upon the court to find out whether in fact cohabitation has come to an end.⁸⁶

81 *Girja Kumari v Vijayanandan* AIR 1995 Ker 159 (relying upon *Sureshta Devi's* case); *Satyabhama v Narendra* AIR 1997 Ori 47.

82 *Munesh v Anasuyama* AIR 2001 Kant 355.

83 *Ashok Hurra v Rupa Bipin Zaveri* AIR 1997 SC 1266.

84 *Kirit v Praful* AIR 1993 Guj 111.

85 *Sureshta Devi v Om Prakash* AIR 1992 SC 1904 (indicative concept of broken down marriage and no possibility of reconciliation).

86 *Leela Joshi v Mahadeo* AIR 1991 Bom 105.

LAWFUL COMPROMISE MAY BE RECORDED

The view has been taken under this section that after the amendment [Marriage Laws (Amendment) Act 1976] it is now possible for the court to dissolve a marriage by agreement between the parties although none of the grounds on which a marriage may be dissolved by a court, be found to exist, provided that the compromise is not in any manner illegal.⁸⁷

‘SUBJECT TO THE PROVISIONS OF THE ACT’

The initial words in the section would apply to both the sub-sections and not merely to sub-s (1). It is submitted that the provisions of s 23 so far as they may be relevant, can also apply to a petition for dissolution of marriage by consent of the parties. The powers of the executing court are limited to attachment of property of the defaulter if the decree of restitution is not obeyed.⁸⁸ The satisfaction of the court, for instance, would require that the parties did not present the petition in collusion. Of course, the court must be satisfied that both the parties have truly and freely agreed to the dissolution of the marriage.⁸⁹ The court may refuse to grant a decree if it is not so satisfied. The court must also ‘make every endeavour to bring about a reconciliation between the parties as required by s 23(2). Consent decree under this section cannot per se be challenged as collusive. That would depend on the facts of the particular case. A party is not disentitled to get a decree for divorce on the ground that there was no cohabitation for one year after a decree for restitution of conjugal rights simply on the ground that the decree was by consent of parties under the present section.⁹⁰

A decree obtained under this section by practising fraud can be recalled by the court in exercise of its appellate powers.⁹¹ When, however there was no element of coercion present, the consent decree cannot be recalled.⁹² Consent decree passed under this section or any other consent decree is appealable.⁹³

The court should make an inquiry into the allegations even if the application is one under this section, it cannot be disposed off ignoring the statutory time limit.⁹⁴

87 *Indramal v Radhey Raman* AIR 1981 All 151 (appeal against decree for divorce—compromise pending appeal—joint application to appellate court).

88 *Vijay Kumar v Neelam Ram* AIR 2004 Raj 256.

89 *Krishnamurthy Rao v Kamalakshi* AIR 1983 Kant 235.

90 *Smriti Kana v Dalip Kumar* AIR 1982 Cal 547.

91 *Pushpalata v Damodar* AIR 1987 Ori 1.

92 *Anita v R Rambilas* AIR 2003 AP 32.

93 *Krishna v Satish Lal* AIR 1987 P&H 191.

94 *Kanchan Mohanty v Kulamani* AIR 1992 Ori 165.

It has been held in the undermentioned case⁹⁵ that sub-s (2) should be read as discretionary only. It does not impose any fetter on the powers of the appeal court to grant instant decree of divorce since the timetable fixed in it does not apply in any case to an appellate court. The time specified in sub-s (2) can be waived, and a decree can be granted without waiting for the prescribed period.

The Andha Pradesh High Court has, however, in a later decision, not followed the earlier decision in *K Om Prakash's* case and has held that the provision, although it may be construed as directory, and not mandatory, cannot be ignored by the High Court.⁹⁶ This appears to be so, since the time-period stipulated by the legislature, has been so fixed that during this time the parties get time for introspection. The provisions of this section have been held to be directory and not mandatory.⁹⁷ The Karnataka High Court has expressed the view that a petition under this section is to be filed before the original court and the High Court in exercise of its appellate jurisdiction, cannot entertain a petition for divorce under this section by treating it as a miscellaneous application in an appeal.⁹⁸

14. No petition for divorce to be presented within one year of marriage.—(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage:

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the

95 *K Om Prakash v K Nalini* AIR 1986 AP 167; *Dhanjit Vadra v Beena Vadra* AIR 1990 Del 146; *Garasia v Mansu* AIR 1988 Guj 159; *Sureshta Devi v Om Prakash* AIR 1992 SC 1904; *Ashok Hurra v Rupa Bipin Zeeveri* AIR 1997 SC 1266; *Byal Bhatt v Chandresh Bhatt* AIR 1999 Guj 203.

96 *Re M Saulaja* AIR 1995 AP 325; *Hitesh Joshi v Jesal Joshi* AIR 2000 AP 362 (time period stipulated is mandatory).

97 *Roopa Reddy v Prabhakar* AIR 1994 Kant 13.

98 *N Vijaya Raghavan v K Sharada* AIR 2001 Kant 300.

expiry of one year from the date to the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing off any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year.

NO PETITION FOR DIVORCE WITHIN ONE YEAR OF MARRIAGE

The rules laid down in this section are intended to give a fair trial to every marriage. The general rule enacted in sub-s (1) of this section is that no petition for a decree of divorce under any of the grounds mentioned in s 13 can be entertained by the court till the period of one year laid down by this section has elapsed. Both the proviso and sub-s (2) deal with matters of considerable importance. Apart from exceptional cases falling under the proviso, the court would have no jurisdiction to entertain any such petition before the statutory period has expired. In the undermentioned case,⁹⁹ a petition was presented before the expiration of the statutory period without pleading the ground of exceptional hardship. Amendment of the petition was allowed after that period had expired to bring the case within the proviso on the ground of substantial justice.

Amendment

Prior to the enactment of the Amendment Act of 1976, the statutory period for presenting a petition for divorce was at least three years from the date of the marriage. By the amendment, that period was reduced from three years to one year.

PROVISO TO SUB-SECTION (1)

The proviso is intended to modify the effect of the one year's limit in very exceptional cases. It enables the court in such cases to entertain a petition for a decree of divorce before the statutory period has expired. The procedure relating to the application for special leave to present such petition is to be regulated by the rules as may be made by the High Court in that behalf. Rules have been framed by various High Courts relating to the application for special leave under the section and service for order granting leave ex

⁹⁹ *Sawita Devi v Pran Nath* AIR 1967 J&K 89.

parte and the procedure to be followed thereafter, if the respondent desires to contest the petition of divorce on the ground that leave for filing the petition has been erroneously granted or improperly obtained. Reference may be made to notes under 'Contested Application for Leave'.

The proviso also lays down in effect that if it appears to the court at the hearing of the petition, where leave had been granted and not revoked, that leave had been obtained by misrepresentation or concealment of the true nature of the case and the court is satisfied that the ground for relief exists, the court may although pass a decree for divorce, suspend the operation of the decree by adding a condition that it shall not operate until after the expiry of one year from the date of the marriage.¹ It is not, however, incumbent on the court to pass a decree suspending its operation and the court may in its discretion dismiss altogether the petition for divorce, in which case a petition may be brought on the same grounds after the expiration of the period laid down in the section.

PROVISO

The proviso engrafts a very important qualification on the general rule laid down in the section that no petition for dissolution of marriage by a decree of divorce can be entertained by the court before the statutory period. It enables the court in the exercise of its discretion to grant leave to present such petition before the expiry of the one year's limit in a case of 'exceptional hardship' to the petitioner or 'exceptional depravity' of the respondent. These expressions occur in the identical context in the English statutes. It may, however, be noted that judicial opinion in England on this question is not quite uniform. However, it does emerge from the decisions given there that the provision is intended *inter alia* to prevent parties from rushing out of marriage so soon as they discover that their marriage was not what they expected. The 'exceptional hardship to the petitioner' or 'exceptional depravity on the part of the respondent' would include not only the acts and conduct in the past. The court may have also to consider whether the petitioner will have to go through exceptional hardship if the remedy is postponed.

'...COURT MAY ALLOW A PETITION TO BE PRESENTED BEFORE ONE YEAR'

The proviso confers a discretion on the court and the court may allow such a petition to be presented on preliminary determination of the matter. The first question that would arise would be whether the case is one of 'exceptional hardship' or 'exceptional depravity'. If the case falls within any

¹ *Stroud v Stroud* [1963] 3 All ER 539.

of the above categories the court will, in the exercise of its discretion, allow the petition to be presented. It is at this stage of granting leave that the court must consider whether there is any reasonable probability of reconciliation between the parties. It is also incumbent on the court at this preliminary stage of granting leave to have regard to the interest of any children of the marriage as categorically laid down in sub-s (2). Of course, these would be all provisional determinations. Even at this stage, the court would look at the facts from the point of view of both the parties.² The approach of the court to the matter should be subjective, and the effect on the particular spouse of the situation which has developed in considering the question of exceptional hardship, must be considered, and not merely to confine itself to an objective view as to how the ordinary spouse might be expected to react in given circumstances.³

‘EXCEPTIONAL HARDSHIP’ OR ‘EXCEPTIONAL DEPRAVITY’

The section does not define these terms presumably because to do so would require modifications, qualifications and exceptions in addition to all implications of these terms which a definition ought not to aim at. The following observations of Denning LJ in *Bowman v Bowman*, cautiously applied can be of guidance and assistance:⁴

The answer depends on the use of the word ‘exceptional’. This involves an inquiry into the degree of depravity alleged or the degree of hardship said to be suffered—an inquiry, which it is plain, may prove to be a difficult task... . The only cases in which the question arises are, ofcourse, those of adultery or of cruelty. If there is nothing more than adultery with one person within a marriage that may be considered ordinary depravity. It may not involve exceptional hardship on the innocent spouse. If, however, the adultery is coupled with other matrimonial offences, eg, if a husband not only commits adultery, but also deserts his wife in favour of another woman, or if he is cruel to her, thus causing her not only distress by his adultery but also injury by his violence, then, even if his offence cannot be stigmatised as exceptional depravity on his part, nevertheless, it does not involve exceptional

² *Brewer v Brewer* [1964] 1 All ER 539, 541, 543 (CA).

³ *Hillier v Hillier* [1958] 2 All ER 261, 263–64.

⁴ [1949] 2 All ER 127 (CA), [1949] P 353; *Meganatha v Susheela* AIR 1957 Mad 423. There are some general observations of courts in England in the following cases which may be useful if cautiously applied: *C v C* [1967] 1 All ER 928; *W v W* [1966] 2 All ER 889; *Hillier v Hillier and Latham* [1958] 2 All ER 261, 263–64; *Brewer v Brewer* [1964] 1 All ER 539, 541–42; *V v V* [1966] 3 All ER 493 (CA) adultery and cruelty of exceptionally grave nature.

hardship suffered by the wife. Even when adultery is not coupled with desertion or cruelty, it may be committed in such aggravating circumstances as to show exceptional depravity, and, even if the adultery is not coupled with another matrimonial offence, nevertheless, its consequences may involve exceptional hardship to the applicant as, for instance, when a wife as a result of her adultery has a child by another man so that the husband if he took her back would have to maintain another man's child. The husband who commits adultery within a few weeks of marriage, or who commits adultery promiscuously with more than one woman, or with his wife's sister, or with a servant in the house may probably be labelled as exceptionally depraved. Cruelty again, by itself is not exceptional but if it is coupled with aggravating circumstances as for instance drunkenness and neglect or if it is exceptionally brutal or dangerous to health, then, even, if it does not evidence exceptional depravity on the part of the respondent, it does, at least, cause exceptional hardship to the applicant. If it is coupled with perverted lust, it shows exceptional depravity on the part of the proposed respondent. One really important consideration in all these cases is to see whether there is any chance of reconciliation. On this point it is most material to inquire what the applicant has already done to try to make the marriage a success or to become reconciled. If the court is not satisfied that all that is reasonable has been done in his respect, it may well dismiss the application.

In the undermentioned case,⁵ the view was expressed that relief could be granted under the rule laid down in the proviso in a case where dissolution of marriage was sought under s 13(1)(iv), if the facts and circumstances of the case establish exceptional hardship to the petitioner.

CONTESTED APPLICATION FOR LEAVE

The applications under the proviso are not meant to be preliminary trials, but intended to be dealt with, without any elaborate inquiry. The leave contemplated should not, however, be granted without giving an opportunity of a reply to the respondent. The rules passed by the various High Courts provide for opposition to the application for leave and the procedure to be followed when the application for leave is contested. In exercising its discretion to grant leave under the proviso, the court would take into consideration not only the averments in the petition or in the affidavit made by the petitioner in support of the same, but also that of the respondent.⁶

⁵ *Padma Rao v. Sivarajya Lakshmi* AIR 1970 AP 300 (virulent and incurable leprosy)

⁶ *Simpson v. Simpson* [1954] 2 All ER 546.

If the affidavit in answer is destructive of the petitioner's case the court can dismiss the application. Even if it is not destructive of the petitioner's case, but only throws doubt on it, the court is entitled to have regard to that doubt in coming to a decision whether to grant or revoke the leave.

DISCRETION OF THE COURT

Whether leave should be granted under this section and when granted ex parte should be revoked or not, are matters of discretion with the court. In exercising discretion in respect of all matters covered by the section, the court is bound to have fullest regard to:

- (i) the interest of any child of the marriage; and
- (ii) the reasonable probability of a reconciliation between the parties.

In all applications of this kind, the possibility of reconciliation is a most important aspect of the case; and where there is any child of the marriage, the interest of the child should be a very weighty matter for consideration.

The appellate court will not interfere with the discretion exercised by the district court, unless that court has proceeded on a wrong principle of law or failed to have regard to a material consideration or some gross injustice has occurred.⁷

REMARRIAGE AFTER DECREE FOR DISSOLUTION OF MARRIAGE

See notes under the next section.

SECTION APPLIES ONLY TO A PETITION FOR DIVORCE

It will be noticed that this section applies only in case of a petition for dissolution of marriage by way of divorce and no such period is prescribed for a petition for judicial separation (s 10) or for nullity of marriage (ss 11–12). Reference may be made to notes under 'Remarriage before disposal of appeal against decree of nullity under ss 11 and 12'.

15. Divorced persons when may marry again.—When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been

⁷ *Meganatha v Susheela* AIR 1957 Mad 423; *Charlesby v Charlesby* (1917) 176 LT 532.

presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

AMENDMENT

There was a proviso to the section which was deleted by the Amending Act of 1976. Reference may be made to notes under 'Deleted Proviso'.

WHEN DIVORCED PERSONS MAY MARRY AGAIN

Section 13 of the Act, which provides for a decree of divorce on stated grounds in case of any marriage solemnised whether before or after the commencement of Act, has to be read with the present section when dealing with the question of the right of the parties to remarry any person after dissolution of the marriage. Under the law laid down in this enactment, monogamy is the rule and a party can only contract a valid second marriage in the manner envisaged in this section. The rule laid down in the section is an integral part of the proceedings by which alone both the parties to the decree of divorce can be released from their incapacity to contract a fresh marriage.⁸

The rule laid down in the section operates in cases where a decree of divorce is granted under the provisions of the Act. The decree may be one under s 13 or under that section read with s 14, which empowers the court, in cases of exceptional hardship or exceptional depravity on the part of the respondent, to grant a decree in case of a petition presented within one year of marriage.

The right to remarry any person after a conclusive decree of divorce can be availed of by either of the spouses whose marriage is dissolved. It is also open to the parties to again intermarry.

A decree granting divorce or dismissing the petition for divorce is appealable.⁹ A decree of divorce may be granted by the court of first instance, or it may be granted in appeal where the trial court has refused to grant it, or the decree granted by the trial court may be confirmed in appeal or there may be no appeal at all against the decree of the trial court. A decree of divorce, as a general rule, operates from the moment it is pronounced. Subject to the limitation relating to remarriage by either spouse as laid down in this section, the effect of a decree of divorce is to dissolve the marriage for all intents and purposes from the date of its pronouncement. The provisions of the section do not have the effect of rendering the decree

⁸ *Warter v Warter* (1890) 15 PD 152; per Sunderson CJ in *Turner v Turner* (1921) 48 Cal 636, 639–40.

⁹ See s 28.

conditional. The Act does not provide for passing of a *decree nisi* and decree absolute, as for instance is done under the Indian Divorce Act 1869.

In case of a decree pronounced under s 14, the court has the discretion to impose the condition that the decree shall not operate until after the expiry of one year from the date of marriage. Obviously, the right to remarry can arise in case of such conditional decree only when it becomes effective.

REMARRIAGE BEFORE DISPOSAL OF APPEAL AGAINST DECREE FOR DISSOLUTION OF MARRIAGE

The section must be read with s 28 of the Act which, inter alia, provides for an appeal against a decree for dissolution of marriage. The effect of the rule laid down in the section is that the conditions stated in it must be fulfilled before a lawful marriage can take place after a decree for dissolution. It follows that if a decree for dissolution is set aside in appeal and a party remarries before disposal of the appeal, such marriage would be a nullity. The pendency of an appeal is enough to hit a marriage entered into during its subsistence.¹⁰

The section when it speaks of a case where there is 'a right of appeal' does not in terms cover a case of an application for special leave to appeal to the Supreme Court. Even so, a party who has succeeded in the High Court and obtained a decree of dissolution cannot, by marrying immediately after the High Court's decree, take away from the losing party the chance of presenting an application for special leave. If the party does so without making sure of the true position, it takes the risk of the leave being granted and the appeal ultimately succeeding, and the decree being set aside.¹¹ The Supreme Court had in this case granted special leave and the appeal ultimately succeeded with the result that the remarriage became a nullity.

DELETED PROVISIO

The proviso to the section which was deleted by the Amending Act of 1976, laid down that it shall not be lawful for the respective parties to marry again, unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance. In *Lila Gupta v Laxmi Narain*,¹² the Supreme Court held that a marriage contracted in

¹⁰ *Kajal Chowdhury v Dilip Chowdhury* AIR 2004 Cal 113.

¹¹ *Chandra Mohini v Avinash Prasad* AIR 1967 SC 581; *Smita Dilip Rana v Dilip Dattaram Rana* AIR 1990 Bom 84; *Vinlesh v Prakash Chand Sharma* AIR 1992 All 260 (marriage during pendency of second appeal).

¹² AIR 1978 SC 1351; *Chinnathayi v Narayanaswami* AIR 1978 Mad 161.

contravention of the rule relating to one year laid down in the proviso would not be void, and overruled the decisions of High Courts in the undermentioned cases.¹³

The result of deleting the proviso, as pointed out by the Supreme Court in the above case, is that the amending parties whose marriage is dissolved by a decree of divorce can contract marriage soon thereafter, provided of course the period of appeal has expired. It may also be noted that all pending proceedings would be decided as if the proviso had not been applicable.¹⁴

REMARRIAGE BEFORE DISPOSAL OF APPEAL AGAINST DECREE OF NULLITY UNDER SECTIONS 11 AND 12

Sections 11 and 12 of the Act relate to passing of decree of nullity by the court in case of void and voidable marriages respectively. Section 28 confers the right of appeal to an aggrieved party *inter alia* against any such decree. The present section relates only to remarriage after a decree for dissolution of marriage, and does not cover the case of any decree of nullity of marriage. On principle, however, it would seem that if any such decree of nullity is set aside in appeal and a party remarries before disposal of the appeal, such subsequent marriage would be a nullity. This view derives some support from observations made by the Supreme Court in the undermentioned case, though in a different context.¹⁵ In a rather peculiar case decided by the Madras High Court,¹⁶ an *ex parte* decree was passed granting declaration of nullity of marriage. The respondent applied for setting aside the *ex parte* decree and the court set it aside. In the meantime, the petitioner contracted a second marriage relying upon the *ex parte* decree, and contended that the order setting aside the *ex parte* decree had become infructuous since she had married again. That contention was negatived. A different view has been taken by the High Courts of Madhya Pradesh,¹⁷ Punjab and Haryana,¹⁸ Allahabad¹⁹ and Bombay.²⁰ In any such case, the remarriage would have the

13 *Uma Charan v Kajal* AIR 1971 Cal 307; *Lila Gupta v Laxminarayan* (1969) 11 R 1 All 92.

14 Reference may be made to cl 39 of the Amending Act of 1976.

15 *Chandra Mohini v Arinash Prasad* AIR 1967 SC 581. *Smita Dilip Rana v Dilip Dattaram Rana* AIR 1990 Bom 84; *Vimlesh v Prakash Chand Sharma* AIR 1992 All 260 (marriage during pendency of second appeal); *Prakash Chand Sharma v Vimlesh* 1995 (4) SCC 642 (Supp) affirming *Vimlesh v Prakash Chand Sharma* AIR 1992 All 260.

16 *Vathsala v Manoharan* AIR 1969 Mad 405.

17 *Mohanmurari v Kusumkumari* AIR 1965 MP 194.

18 *Pramod Sharma v Radha* AIR 1976 P&H 355.

19 *Jamboo Prasad v Malti Prabha* AIR 1979 All 260.

20 *Lata v Vilas* AIR 1987 Bom 231.

effect of rendering the appeal infructuous. The High Court of Jammu and Kashmir²¹ has dissented from the above view, the appeal being treated as a continuation of the original proceeding (suit). Overruling the decision of the Bombay High Court, the Supreme Court held in *Lata Kamat v Vilas*²² that the appeal would not be rendered infructuous due to the second marriage during pendency of the same. Thus, it is respectfully stated that the view taken by the High Courts of Madhya Pradesh, Punjab, Haryana, Allahabad and Bombay is erroneous, and that of the Madras High Court is correct.

16. Legitimacy of children of void and voidable marriages.—(1)

Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights into the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

This section was substituted for the old s 16, which was as under:

16. Where a decree of nullity is granted in respect of a voidable marriage under s 11 or s 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the

21 *Krishenlal v Krishna* AIR 1971 J&K 31.

22 *Lata Kamat v Vilas* AIR 1989 SC 1477; *Tejinderkumar v Gurnmeet Singh* AIR 1988 SC 839; *Veena Rani v Romesh Kumar* AIR 1995 P&H 213.

marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

LEGITIMACY OF CHILDREN OF VOID OR VOIDABLE MARRIAGE

Under general law, a legitimate child is one born out of a lawful wedlock. It is well-settled that, except in the cases where special provision to the contrary is made by any enactment, a marriage which is null and void *ipso jure* or declared to be null and void by the court or annulled by the court on the ground of its voidability, will inevitably have the effect of bastardising any child born of the parties to such marriage. The effect of a decree of nullity in case of a void marriage or annulment of a voidable marriage, generally would be to render the marriage null and void from its inception for all intents and purposes. It has always been extremely unfortunate for a child, the putative marriage of whose parents is null and void or annulled by the court on some ground such as is to be found in ss 11 and 12 of the Act. The present section deals with legitimacy of children, both in case of void and voidable marriages of the parents. The joint committee observed that in no case should children—meaning thereby children of persons whose marriage is solemnised, but is void or voidable under ss 11 or 12—be regarded as illegitimate and the clause has provided for this and also for the legitimacy of children *en ventre sa mere* at the time of the proceedings.

The question of succession by such 'son' or 'daughter' to the property of the 'father' or 'mother' was examined in the undermentioned case.²³

SUB-SECTION (1)

Sub-section (1) relates to children of a marriage which is void under s 11, regardless of whether any decree of nullity of marriage has been granted in any proceeding under the Act or otherwise. The present provision though enacted by the Amending Act of 1976, is applicable even in the case of a child born before such amendment, in case the marriage of the parents was void under s 11 of the Act which came into force in 1955. It is immaterial

²³ *Laxmibai v Limbikai* AIR 1983 Bom 222. See Notes under s 8 of the Hindu Succession Act 1956.

whether any proceedings had taken place. The protection given to the child in case of any such marriage is complete as laid down in the sub-section, subject, ofcourse, to the rule enacted in sub-s (3).

In a judgment having far reaching effects and implications, this provision was examined and interpreted by the Supreme Court. Analysing the provision, the court held that by virtue of the words 'notwithstanding that a marriage is null and void under s 11', this section stands independent of s 11. The amended provision which intended the conferment of legitimacy on children born of a void marriage, will operate despite the provisions contained in s 11, which has the effect of nullifying only those marriages held after the Act came into force, and which are performed in contravention of s 5.

The significance of this interpretation is that by virtue of the legal fiction as is operative in this section, children born of a void marriage would have to be treated as legitimate for all purposes including succession to the property of their parents. The net effect being that the benefit of legitimacy is conferred upon any child born either before or after the date of the amendment. This would mean that even if a marriage had been contracted at the time when there was a legislative bar to such a marriage, the offspring of such a marriage would be treated as legitimate. Such a child would, by virtue of this interpretation, be entitled to succeed to the property of his or her parents.²⁴

A learned single judge of the Madhya Pradesh High Court has, however held that for the purposes of legitimacy of children of a void marriage, there must exist proof of such a marriage,²⁵ in the absence of which, the children of such a marriage cannot claim legitimacy.

SUB-SECTION (2)

Sub-section (2) relates to children of a voidable marriage in respect of which a decree of annulment may be granted under s 12. If the validity of the marriage is challenged by either party and though challenged, the marriage is not annulled, it would be a valid marriage, and the children of the parties to such a marriage would undoubtedly be legitimate. Moreover, even if the marriage is annulled at the instance of either party, the children born of such

24 *PEK Kalliani Amma v K Deri* AIR 1996 SC 1963; *Rameshwaridervi v State of Bihar* AIR 2000 SC 735 (children of second marriage entitled to share in retrial benefits, with children of first marriage); *G Nirmalaamma v G Sithapathi* AIR 2001 AP 104 (this decision does not appear to take the correct view in light of the decision in *Jinia Keotin v Kumar Sitaram Manjhi* (2003) 1 SCC 730 *infra*) (illegitimate son entitled to be treated as coparcener—however, he cannot claim partition during the lifetime of his father—limited to father's share); *Kangavalli v Saroja* AIR 2002 Mad 73.

25 *Ramkali v Mahila Shyamvati* AIR 2000 MP 288.

marriage are, by operation of sub-s (2), to be deemed to be their legitimate children for all intents and purposes, except that by virtue of sub-s (3), such children cannot claim any rights in or over property of any person other than parents. This is to be the result, notwithstanding the decree of annulment of marriage that may be passed by the court. It is by a *fictio juris* that the legislature has brought about this result. When a statute enacts that something shall be deemed to exist, or some status shall be deemed to have been acquired, which would not have been so but for the enactment the court is entitled and bound to ascertain for what purpose and between what parties the statutory fiction is to be resorted to, and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. See Illustrations below.

A voidable marriage can only be challenged at the instance of either party to the marriage, and cannot be challenged after the death of one of the parties to the same. So if the marriage, though voidable, was not challenged during the lifetime of a spouse, it cannot be challenged thereafter and the issue of such marriage would be legitimate, and no question would arise of the applicability of the rule.

AMENDMENTS

In the earlier editions of this book, attention was drawn to the unsatisfactory language of the old section and it was *inter alia*, pointed out that a child born of a void marriage would not get the protection of section, unless a decree of nullity had been passed by the court at the instance of one of the parties to the marriage. It was also stated:

This is an anomalous and startling position which could hardly have been contemplated. The language of the section borrowed from the English enactment is plain and unambiguous and it would be straining the language beyond permissible limits to say that such cases also are within the ambit of the section. It is submitted that this is a *casus omissus* which the court cannot reach and no canon of construction permits the court to supply what is clearly a lacuna in the statute and it is for the legislature to set the matter right by appropriate amendment of the section.

In the notes of the Clauses of the Bill of Amending Act 1976, it is stated: 'This clause seeks to substitute s 16 so as to clarify the intention and to remove difficulties in interpretation'.

Suitable changes have now been made in respect of marriages affected by both ss 11 and 12.

In the undermentioned²⁶ case, the view was expressed that it is only when a decree of nullity is granted in respect of any such marriage that any

²⁶ *Thulasi Ammal v Gouri Ammal* AIR 1964 Mad 118, *Gurnam Kaur v Puran Singh* (1976) 78 PLR 164; *Charan Singh v Major Singh* (1976) 78 PLR 367.

child begotten or conceived before the decree is made, can be deemed to be legitimate. However, where no such decree has been obtained, no part of the section can be invoked for the purpose of legitimatising an issue born of a void marriage. The position is different after the amendment.

The section applies to children of a marriage, void or voidable under ss 11 and 12. Section 11 applies only in case of a marriage solemnised after the commencement of the Act, the question whether a ceremonial marriage between Hindus performed before the Act came into operation is valid or void, is governed by the previous law. That section does not apply to children of any such marriage with the result that the question of legitimacy of the children of any such marriage must be determined by the rule of Hindu law governing the parties, and not by the express enactment contained in this section. Section 12, however, speaks of any marriage solemnised before or after the commencement of the Act and the present section, therefore, applies to the children of any such marriage.

SUB-SECTION (3)

Sub-sections (1) and (2) of this section makes it abundantly clear that, even in case of a marriage void or voidable under the Act, the children of any such marriage have the status of legitimate children. Such children would be regarded in law as legitimate children of the parents for all purposes including succession. However, as laid down in the sub-section, such children cannot, by relying on the status conferred on them by sub-ss (1) and (2), claim any right in or to the property of any person other than the parents. Sub-section (3) might have been more explicitly worded. It does not say that conversely, persons other than the parents cannot claim any right in or to the property of the children who are to be regarded the legitimate children of their parents, and leaves it to be understood as a necessary inference. The sub-section read as a whole would seem to indicate the converse rule that no persons other than the parents can claim any right in or to the property of such children by operation of the rule laid down in the section.

The Bombay High Court²⁷ has expressed the view that property to which a child, under this section, can lay a claim would be the separate property of the father, and not the coparcenary property in which the child has a share. The Supreme Court has now held that it is only the separate property of the parents that an illegitimate child can lay a claim to. Holding that such child cannot succeed to coparcenary property in which the father has a

²⁷ *Shantaram v Dugubai* AIR 1987 Bom 182 (earlier decision of the same High Court discussed), see para 27 of the judgment; *Jagarlammudi Sujata v Jagarlammudi* AIR 1992 AP 291; *A Parasurama Reddiar v Arunachala Reddiar* AIR 1999 Mad 143; *Madhavan Balsundaram v Sarasamma* AIR 2004 Ker 79 (such child held entitled to a share alongwith children of lawfully wedded wife).

share, the court discountenanced the argument that the section was widely worded so as to include all property and cautioned against such a wide and expansive interpretation.²⁸ Reference may be made to notes under ss 8 and 15 of the Hindu Succession Act. Such rights of the offspring of a second marriage, during the subsistence of the first one would be circumscribed to the above extent only.

Illustrations

- (1) *A* was married to *B* before the Act came into operation. The marriage was performed in accordance with the requisite ceremonies, but was invalid as the parties were related to each other within the prohibited degrees. *C* is a son born of the marriage, is not the legitimate son of *A* and *B* and is not entitled to claim any right of interest in the property left by *A* or *B* by operation of the rule laid down in this section. The rights of *C* *quod* the property of *A* or *B* will be governed by the rules of Hindu law relating to illegitimate children. In case of death of *A* and *B* after the coming into operation of the Hindu Succession Act, the rights of *C* in matters of succession to the property of such parent will be governed by the rules laid down in that enactment.
- (2) *A* was married to *B* before the Act came into operation. The marriage was performed in accordance with the requisite ceremonies. *C*, a son was born of the marriage. *B* thereafter, obtains a decree of annulment of the marriage (s 12) on the ground that her consent to the marriage was obtained by fraud practised upon her by *A*. The decree of annulment will operate as from the date of the marriage, but *C* will be deemed to be the legitimate child of *A* and *B*. There will be mutual rights of inheritance and succession between *C* and his father *A*, and *C* and his mother *B*.

The same will be the position if the marriage of *A* and *B* in the above case had been solemnised after the Act came into operation.

- (3) *A* was married to *B* after the Act came into operation and the marriage was solemnised in accordance with the customary rights and ceremonies. *C*, a son, was born of the marriage. The marriage was void as *A* had another wife living at the time of the marriage and the marriage was declared null and void in a petition presented to the court. Notwithstanding the decree of nullity, *C* will be deemed to be the legitimate child of *A* and *B* and entitled to succeed to the property of *A* as an heir under s 8 of the Hindu Succession Act 1956, read with Class I of the Schedule to that enactment. *C* will be entitled to succeed to the property of *B* under s 15 of that

²⁸ *Jinia Keotin v Kumar Sitaram Manjhi* (2003) 1 SCC 730

enactment. Conversely, *B* will be entitled to succeed to the property of *C*, as mother, under s 8 of that enactment read with Class I of the Schedule to the same and failing any heir of *C* falling under Class I of that Schedule, *A* will become entitled to succeed to the property of *C*, as father who is one of the heirs specified in Class II of the Schedule to the enactment. The position of children in the above case will be the same for instance if no proceeding had been adopted in court for a declaration of nullity of the marriage of the parents.

In none of the cases illustrated above, *C* can claim to inherit the property of any person other than *A* or *B* solely by operation of the status of legitimacy conferred on him by this section; and conversely, it is submitted, no person other than *A* or *B* can claim to succeed to the property of *C*, solely relying on the rule relating to legitimacy enacted in this section. In certain cases reliance may be placed on the provisions of the Hindu Succession Act 1956, under which illegitimate children are deemed to be related to one another (proviso to s 3(1)(j)).

17. Punishment of bigamy.—Any marriage between two Hindus solemnised after the commencement of this Act is void if at the date of such marriage either party had a husband or a wife living; and the provisions of sections 494 and 495 of the Indian Penal Code 1860 (45 of 1860), shall apply accordingly.

Sections 11 and 17 do not offend art 15(1) of the Constitution.²⁹

Clause (1) of s 5 introduces monogamy in the law applicable to Hindus by enacting as an essential condition of marriage that neither party must have a spouse living at the time of marriage. A marriage in contravention of that condition is a nullity. A prior subsisting marriage is a civil disability which renders marriage with any person whose prior marriage is subsisting void *ab initio*, with the result that the parties to such marriage are not husband and wife. Section 11 lays down inter alia, the rule that any such marriage solemnised after the commencement of this Act is void. This section also in terms reproduces that rule and also declares that the provisions of ss 494 and 495 of the Indian Penal Code which impose punishment for the offence of bigamy are applicable in case of any such marriage.

‘SOLEMNISED’: PROOF OF SOLEMNISATION

It now clearly emerges from decisions of the Supreme Court that *prima facie*, the expression ‘whoever—marries’ in s 494 of the Indian Penal Code

²⁹ *Sambireddy v Jayamma* AIR 1972 AP 156 (FB).

must mean 'whoever marries validly' and 'whose marriage is a valid one'. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the lifetime of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of the law. One of the conditions of a valid marriage under the Act requires that it must be 'solemnised'. The word 'solemnise', in this connection means to celebrate the marriage with proper ceremonies and in due form. Unless the marriage is celebrated or performed with the proper ceremonies and in due form, it cannot be said to be solemnised. It is, therefore, essential for the purpose of this section that the marriage, to which s 494 of the IPC applies on account of this section, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom. It has accordingly been held by the Supreme Court in the undermentioned cases that the alleged bigamous marriages were not proved to have been 'solemnised', and order of conviction for the offence of bigamy were set aside.³⁰ The view was also taken that admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case.³¹ The legal position summarised above was reaffirmed by the Supreme Court in later decisions.³² It has also got to be shown that the first marriage was a valid marriage, duly solemnised.

It has now been held that, if a person enters into matrimony for a second time, during the lifetime of his wife, such marriage apart from being void under ss 11 and 17 of this Act, would also constitute an offence under s 495 of the Indian Penal Code. While this section speaks of marriage between two Hindus, there is no such qualification under s 495 of the Indian Penal Code, as it does not refer to any religious denomination. Conversion to another religion and subsequent remarriage does not by itself result in dissolution of the earlier marriage.³³ It has also been held in the above decision that the judgment of the court in *Sarla Mudgal's* case³⁴ taking the

30 *Bhaurao v State of Maharashtra* AIR 1965 SC 1564, *Kanwal Ram v Himachal Pradesh Administration* AIR 1966 SC 616.

31 *Kanwal Ram v Himachal Pradesh Administration* AIR 1966 SC 616.

32 *Priva Bala v Suresh Chandra* AIR 1971 SC 1153; *Gopal Lal v State of Rajasthan* AIR 1979 SC 713; *Rabindra Nath Dutt v State* AIR 1969 Cal 55; *Balaram v Suryada* AIR 1969 Assam 90; *Ram Singh v Sushila Bai* AIR 1970 Mys 201; *Rabindra Kumar v Pratiba* AIR 1970 Tri 30; *Mukta Jesing v Vallabhdas* (1973) 14 Guj R 707 (mere registration of caste organisation); *Phankari v State* AIR 1965 J&K 105; *Subbaratnyudu v Venkatiah* AIR 1968 AP 107; *Re Raghava Reddy* AIR 1968 AP 117 (custom of Reddi community in Telangana).

33 *Lily Thomas v Union of India* AIR 2000 SC 1650 (earlier case law discussed).

34 *Sarla Mudgal v Union of India* AIR 1995 SC 1531.

view that the husband was guilty under s 495 of the Indian Penal Code did not offend art 21 of the Constitution. The court clarified that it had not directed or recommended codification of a uniform civil code in *Sarla Mudgal's* case *supra*, as reiterated in *Pannalal's* case.³⁵

In case of notified tribes, since they would not fall within the purview of this Act, in the absence of a custom prohibiting a second marriage, such subsequent marriage would not attract the provisions of ss 494 and 495 of the Indian Penal Code.³⁶

INJUNCTION

There is no provision of the Act under which a wife apprehending a second marriage by her husband can ask for an injunction restraining the husband from committing bigamy. Such marriage would be void. The present section applies only when bigamy is committed.³⁷ On the same principle, the court declined to grant a permanent injunction against the (alleged) wife from remarrying.³⁸ The court would not grant an interim injunction in a case of this nature.³⁹

Reference may be made to the notes under s 11.

VENUE OF TRIAL

The jurisdiction to deal with an offence under this section read with s 494 of the Penal Code will be governed by s 177 of the Criminal Procedure Code, and not s 19 of this Act.⁴⁰

18. Punishment for contravention of certain other conditions for a Hindu marriage.—Every person who procures a marriage of himself or herself to be solemnised under this Act in contravention of the conditions specified in clauses (iii), (iv) and (v) of section 5 shall be punishable—

- (a) in the case of a contravention of the condition specified in clause (iii) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;
- (b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of section 5, with simple imprisonment

35 *Pannalal Bansilal v State of Andhra Pradesh* AIR 1996 SC 1023.

36 *Surajmani Stella Kujur (Dr) v Durga Charan Hansdah* (2001) 2 JT 631.

37 *Umashankar v Radha Devi* AIR 1965 Pat 220.

38 *Trilokchand v Om Prakash* AIR 1974 Pat 335.

39 *Parbati Debi v Harvindra Singh* AIR 1980 Raj 249.

40 *Krishnaswami v Krishnaswami* AIR 1967 Mad 241.

which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

AMENDMENT

The Amending Act of 1978 deleted reference to cl (vi) of s 5 in the original section and also deleted cl (c) of the original section. Clause (vi) itself of s 5 was deleted by the Amending Act of 1978. Reference may be made to 'Amendments' under s 5. The deleted cl (c) of this section related to contravention of the condition specified in cl (vi) of s 5 and was, therefore, deleted.

No commentary is called for on this section except that it was desirable that persons contravening the important conditions for a Hindu Marriage, specified in s 5, should be punished. This section may be read with Child Marriage Restraint Act 1929 as amended in 1978.

CHAPTER V

JURISDICTION AND PROCEDURE

19. Court to which petition shall be presented.—Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction—

- (i) the marriage was solemnised; or
- (ii) the respondent, at the time of the presentation of the petition, resides; or
- (iii) the parties to the marriage last resided together; or
- (iv) the petitioner is residing at the time of the presentation of the petition, in a case where the respondent is, at that time, residing outside the territories to which this Act extends, or has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of him if he were alive.

AMENDMENT

Before its amendment by the Act of 1976 this section was as under:

19. Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnised or the husband and wife reside or last resided together.

‘PETITION’

Where a ‘suit’ instead of a ‘petition’, as required by this section, is filed in a court having jurisdiction under this Act to entertain the same, the judgment and decree passed by such court would not be without jurisdiction.⁴¹

JURISDICTION

The section lays down certain rules relating to jurisdiction. It is only the ‘district court’ as defined in s 3(b) that has jurisdiction to entertain and try matters arising under the Act⁴² (see ‘district court’). The section regulates the venue and lays down four possible territorial limits for the purpose of jurisdiction. One is the territorial jurisdiction of a district court within which the marriage was solemnised referring thereby, to the place where the rites and ceremonies of the marriage were performed. No question of residence of the parties arises when a petition under the Act is presented to such court. The second relates to the place of residence of the respondent at the time of the presentation of the petition. The third relates to the place where the parties to the marriage last resided together. The parties might have after their marriage resided together in more places than one in India. In such a case, the question where they last resided together would be material for the purpose of jurisdiction because it is their residence in the last of such places that gives jurisdiction to the court and not their residing together in any other place or places prior to that. The place where the husband and wife last resided together contemplated by the section is a place within the jurisdiction of any district court in India and, therefore, if the husband and wife after residing together for some time at any place in India go to a foreign country and after residing there begin to live separately, the district court within whose jurisdiction they last resided in India would have jurisdiction to entertain a petition under the Act.⁴³ The section gives the petitioning spouse the choice of selecting the forum either as the district in which the marriage was solemnised, or the district where the respondent resides at the time of presentation of the petition, or where the husband and wife last resided together with the further choice that the petition may also be presented to the district court within whose local jurisdiction the petitioner resides in cases falling under cl (iv) of the section.

⁴¹ *Krishneshwari v Ramesh Chandra* AIR 1965 All 228; *Umashankar v Radha* AIR 1967 Pat 220.

⁴² This section has no application to the trial of any offence created by the Act which must be tried by the courts empowered to try criminal cases: *Gowri Thimma Reddy v State of Andhra Pradesh* AIR 1958 AP 318; nor has the section application to a suit for divorce based on customary law saved by operation of s 29(2).

⁴³ *Desouza v Desouza* (1935) 37 Bom LR 55.

In this context regarding the decisiveness of jurisdiction of the court, when both spouses are serving at different places, the visit of the wife to the place of the husband is determinative and the visit to the parental house of the husband is not, as the parental house cannot be said to be the matrimonial home.⁴⁴ When the marriage was solemnised at a particular place and the wife also resided there, the plea that the husband resided outside the municipal limits of the place could not be a ground for transfer of the proceedings.⁴⁵

...‘RESIDES’... ‘RESIDED’

The words ‘resides’ and ‘resided’ have to be construed according to the supposed intention of the legislature. The same expression ‘last resided’ takes colour from the word ‘reside’ and the same meaning should be given to these words. The word ‘resides’ is capable of being understood in its ordinary sense of having one’s home or dwelling permanently, as well as in an extended sense. A mere sojourn which is casual or what is sometimes described as ‘mere passage residence’ or the residence of a traveller passing from one place to another on his travels would not be such residence as is sufficient in law. The residence, however, need not necessarily be permanent. It would be enough if it is bona fide, with an element of continuity about it so that even if temporary, it is something more than being merely casual or for a passing purpose. There must be *animus manendi*. There are decisions under other matrimonial enactments where the words ‘reside’ and ‘last resided’ have been used and there are cases on either side of the line on the question as to when residence, which though temporary, can be said to amount to residence within the meaning of these words. In the ultimate analysis the decision must largely rest on the facts and circumstances of the particular case.

In *Jeevanti v Kishan Chandra*,⁴⁶ the Supreme Court pointed out that the word reside ‘is not free from all ambiguity’ and observed inter alia that ‘in the context of the present section the word must mean the actual place of residence and not a legal or constructive residence; it certainly does not connote the place of origin’. In order to give jurisdiction on the ground of residence, ‘something more than a temporary stay is required. It must be more or less of a permanent character and of such nature that the courts in which the respondent is sued is his or her natural forum.’

The words, ‘resides’ and ‘last resided’ came up for consideration in *Jagm*

14 *Jagir Kaur v Jaswant Singh* AIR 1963 SC 1521, 1524; *Pushpa Dutt Mishra v Archana Mishra* AIR 1992 MP 260.

15 *Chander Kanta v Mohinder Pal Dogra* AIR 2003 P&H 255

16 AIR 1982 SC 3

*Kaur v Jaswant Singh*⁴⁷ decided by the Supreme Court, which was a case under s 488 of the Criminal Procedure Code. Although the analogy cannot be said to be perfect, the observations made there are sure to be useful in cases arising under the present section:

...a person resides in a place if he through choice makes it his abode permanently or even temporarily; whether a person has chosen a particular place as his abode depends upon the facts of each case.

The residence must be bona fide, and not casual or as a traveller⁴⁸ or taken up merely for the purpose of presenting a petition to any particular court and with a view to enabling that court to entertain the same. A person who merely comes in and uses his presence at a place within the jurisdiction of a court as the means of obtaining the benefit of the rule cannot be said to reside at that place. As was observed:

Taking the word (residence) in its ordinary acceptance, it conveys the idea, if not of permanence, at any rate of some degree of continuance.... To serve as a foundation for the court's jurisdiction...the residence...must be something more than occupation during occasional and casual visits within the local limits of the court, more especially where there is a residence outside those limits marked with a considerable measure of continuance.⁴⁹

Some different considerations, however, must arise in case of persons who do not have any fixed home or settled abode at any particular place. Where the husband and wife did not have any fixed marital home at any place after their marriage, question may arise whether they can be said to have resided together where they last lived together. The word 'resides' is by no means free from all ambiguity and is capable of a variety of meanings according to the circumstances to which it is applicable and the context in which it is found. It does seem, therefore, that in cases of the nature indicated above, a somewhat extended meaning would be given to the words 'resides' and 'last resided together'. In a number of cases decided

47 AIR 1963 SC 1521, 1524; *Desouza v Desouza* (1935) 37 Bom LR 55; *Lalithamma v Kannan* AIR 1966 Mys 178; *Santosh Kumari v Om Prakash* AIR 1977 All 97; *Sirothia v Sirothia* AIR 1974 All 36; *Sushma Dewan v AK Dewan* AIR 1973 P&H 256 (question is not one measured by days, but of substance); *Saroja v Emannual* AIR 1965 Mys 12 (spouses having no common permanent home); *Pritma Sharma v Mohinder S Bharadwag* AIR 1984 P&H 305 (spouses employed at different places and having separate residential houses—visit by one to the other's place—amount to reside at such places).

48 *Wadia v Wadia* (1913) 15 Bom LR 593, 602; *Panthaky v Panthaky* (1941) 43 Bom LR 569, 574–76; *Carol v Carol* AIR 1933 All 39; *Robey v Robey* [31] AC 121; *Flowers v Flowers* (1910) 32 All 203; *Ashok v Vishwa Bharti* AIR 1978 All 18; *Supruja v Vasudev* AIR 1973 All 94 (intention was not to reside: two days).

49 *Banerjee v Banerjee* (1899) 3 CWN 250.

under the Indian Divorce Act 1869, some of which⁵⁰ were characterised as extreme ones in a later decision of the Bombay High Court,⁵¹ a very wide and extended meaning was given to these words and a husband and wife who had last lived together any place for a few days were held for the purpose of jurisdiction to have 'last resided together' at that place. It was pointed out in the above decision that those extreme cases could not be taken as a starting point in considering the question of the duration of so-called residence. Moreover, it must be noticed that those decisions were under an Act, the scheme of which on the point of jurisdiction was in some respects different, and an examination of those cases will show that in some of them the courts acted with considerable hesitation.⁵² It is submitted that the expression should neither be strained to amplify the jurisdiction of the court, nor narrowed to minimise it. They permit of being understood in a broad and somewhat elastic sense in case of parties who did not or do not have any place of abode of a permanent character. They do not, however, in the context of the present enactment permit of the very wide import given to them in some of those decisions. Even in the broad sense attributable to them, there must be some element of a home or abode because the residence of a person is by implication a home of that person. Mere casual or temporary visit to a place or temporary sojourn in a place would not satisfy the requirement of the section. There must be an element of continuance, though the degree of continuance is not capable of precise definition.

Prior to the amendment of the section, cases did sometimes arise where the requirements of the section relating to jurisdiction could not be satisfied at all and it was held that reliance could be placed on s 20 of the CPC. There is little possibility of any such case arising after the amendment of the section, but if it did arise the court may invoke the principle on which those earlier cases were decided.⁵³

The questions as to where the marriage was solemnised and as to the last place of residence being questions of law and fact, cannot be decided as preliminary issues, since they require leading of evidence.⁵⁴

DENIAL OF MARRIAGE

The court which entertains any petition under the section would necessarily have jurisdiction to decide the issue of existence of the relationship of husband and wife.⁵⁵

⁵⁰ *Bright v Bright* (1909) 36 Cal 964; *Murphy v Murphy* (1920) 22 Bom LR 1077.

⁵¹ *Walsh v Walsh* (1927) 29 Bom LR 308, 311; *Saroja v Emmanuel* AIR 1965 Mys 178.

⁵² *Bright v Bright* 36 Cal 964, 966.

⁵³ *Gomathi v Natrajam* AIR 1973 Mad 247; *Hariram v Jasoti* AIR 1963 Bom 176.

⁵⁴ *Rajshree v Principal Judge* AIR 1994 Raj 156.

⁵⁵ *Gurdial Kaur v Mukand Singh* AIR 1967 Punj 235.

DISTRICT COURT

It is only the 'district court' as defined in s 3(b) that has jurisdiction to entertain and try matters arising under the Act. According to s 3(b), 'District Court' means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the state government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act. A court coming within the purview of this definition has exclusive jurisdiction and, therefore, a munsif, not invested with jurisdiction under s 3, has no jurisdiction to decide, for instance, a petition for restitution of conjugal rights filed after the coming into operation of the Act.⁵⁶ So also, exclusive jurisdiction has been conferred on the city civil court (Calcutta) without any qualification and a suit for declaration of nullity of marriage cannot be brought on the original side of the Calcutta High Court.⁵⁷

In the undermentioned cases,⁵⁸ the view has been taken that the effect of the present section read with s 3(b) is that the proceeding is to be started before the district judge, ie, the application on which it would commence would have to be presented before him, and that he alone would have the power to entertain it or its initiation, but once it is entertained by him, it is amenable to his powers of assignment or transfer under the relevant Civil Courts Act and such powers have not been taken away or curtailed by the present Act.

On the question of 'District Court' and jurisdiction, reference may be made to the undermentioned cases.⁵⁹

Reference may also be made to the undermentioned case regarding the area of territory over which a judge empowered by notification can exercise the special jurisdiction.⁶⁰

Reference may also be made to notes under s 3(b).

56 *Bootan Bai v Durgaprasad* AIR 1959 MP 410; *Bikram Singh v Sudarsan Singh* AIR 1961 All 150; *Balwant Kunwar v Addl Munsiff Dehradun* AIR 1959 All 7; *Bharawan Bai v Lila Ram* AIR 1963 Punj 118; *Pushpadevi v Radhey Shyam* AIR 1972 Raj 260.

57 *Monika Das Gupta v Promode Kumar* AIR 1960 Cal 577.

58 *Ajit Kumar v Kanan Bala* AIR 1960 Cal 565, 64 CWN 246; *Ram Pal v Ajit Kaur* AIR 1962 J&K 42; *Rajamma v Krishnama* AIR 1964 AP 460; *Veena Lodha v N.M. Lodha* AIR 1977 Raj 134; *Pushpadevi v Radhey Shyam* AIR 1972 Raj 260; contra *Janak Dulari v Narain Dass* AIR 1959 Punj 50.

59 *Narendra Nath v Sudarshan Sekhar* AIR 1969 Mani 93 (Addl District Judge); *Laxman Singh v Kesarbai* AIR 1966 MP 166 (Madhya Pradesh Civil Courts Act); *Girwar Singh v Premavati* AIR 1972 All 474 (Judge of Small Causes Court enjoying powers under s 3(b)); *Dal Chand v Swarn Pratap* AIR 1965 All 46; *Krishnaswami v Ramesh Chandra* AIR 1965 All 228; *Laxmansingh v Kesarbai* AIR 1966 MP 166; *Sasanka Shekhar v Dipika* AIR 1993 Cal 203 (suit for dissolution of marriage on ground of concealment of religion (non-Hindu) not barred under this section)

60 *Tayawwa v Chinnappa* AIR 1962 Mys 130.

20. Contents and verification of petitions—(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and, except in a petition under section 11, shall also state that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in the manner required by law for the verification of complaints, and may, at the hearing, be referred to as evidence.

AMENDMENT

The words 'except in a petition under s 11' were added in sub-s (1) by the Amending Act of 1976.

Sub-section (1) requires that the petition for any relief under the Act must distinctly set out the nature of the case and the facts on which the claim to relief is founded. It is also necessary for the petitioner to state in the petition that there is no collusion between the parties to the marriage. No such averment is necessary in case of a petition under s 11 since there is no likelihood of any collusion between the parties in case of any such petition. Section 21 rules that subject to the provisions of the Act and rules that may be made by the High Court under the Act, all proceedings shall be regulated by the provisions of the Code of Civil Procedure. The rules framed by the various High Courts under s 21 of the Act require that, in addition to the particulars required to be given under O 7, r 1 of the CPC and sub-s (1) above, every petition for judicial separation, nullity of marriage and divorce shall contain certain particulars. It is incumbent on the petitioner to state in the petition all those particulars to enable the respondent or respondents to meet the allegations made by the petitioner. The rules made by the High Courts in most cases require that every petition under the Act shall be accompanied by a certified extract from the Hindu Marriage Register maintained under s 8 of the Act. They also provide for impleading the necessary parties to such proceedings; for contents of application for leave under s 14 of the Act; for contents of written statement by respondent in answer to the petition; for contents of intervenor's petition and answer to the same; and contents of application for alimony and maintenance.

Sub-section (2) rules that the statements contained in every petition shall be verified by the petitioner or some other competent person in the manner required by law. Order 6, r 15 of the CPC, lays down the mode of verification of pleadings.

'STATEMENTS...IN PETITION...MAY BE REFERRED TO AS EVIDENCE'

Under the general rules of practice and procedure, the verification of a plaint is not evidence on which a suit can be decreed even if the defendant does not appear at the hearing.⁶¹ In England, the Divorce Court has a discretion to allow affidavit evidence, but the view that is preferred is that as a general rule such evidence should not be allowed save in exceptional cases.⁶² Section 47 of the Indian Divorce Act 1869, contains a provision similar to that in the present section. In a Bombay case, it was pointed out that although technically, the court is entitled to refer to the allegations in a properly verified petition, the court should invariably follow the practice that the parties must give viva voce evidence in every case, unless there are some very good reasons to the contrary.⁶³ It is submitted that the ordinary practice should be departed from in cases under the Act only in exceptional circumstances. The court has a discretion vested in it, but the discretion would be exercised sparingly and with caution and only in special and extraordinary situations.

21. Application of Act 5 of 1908.—Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure 1908.

PROCEDURE REGULATED BY THE CODE OF CIVIL PROCEDURE 1908 AND HIGH COURT RULES

Except as is otherwise provided in the Act, all matters of procedure under the Act are to be regulated by the Code of Civil Procedure. This section confers on the High Court power to make rules regulating the procedure to be adopted for the purpose of carrying into effect the various provisions of the Act. The rules to be framed by the High Court must be only for the specified purpose and consistent with the provisions of the Act, both substantive and adjectival. There are a number of sections in the Act which lay down rules touching matters of procedure and any rule framed by the High Court which is inconsistent with, or deprives a person of the benefit of any of those rules,

61 *Ross & Co v Scriven* (1916) 43 Cal 1001, 1010–12, 34 I Cal 235.

62 *Gayer v Gayer* (1917) P 64 (CA); *Studdy v Studdy* (1859) 1 Sw & Tr 321, 324. In recent years, courts in England have shown some leniency in the matter of allowing affidavit evidence when there is no danger of injustice being done.

63 *Premchand v Bai Galal* (1927) 29 Bom LR 1336, 1345; *Kaushalya v Lal Chand* AIR 1972 Raj 253.

would be of no effect, and would be ultra vires the powers of the High Court in that behalf. It may be noted that it is not necessary that the rules framed by the High Court under this Act should be consistent with the provisions of the Code of Civil Procedure 1908. In matters relating to which there is no provision in the Act and which are not regulated by the rules made by the High Court, the procedure to be followed under the Act in all proceedings must be regulated, as far as may be, by the Code of Civil Procedure 1908. It has accordingly been held that the provisions of O 1, r 10;⁶⁴ O 7, r 1;⁶⁵ O 8, rr 4 and 5;⁶⁶ O 9, rr 8, 9 and 13; O 11 and O 22 of the Code of Civil Procedure 1908 apply to proceedings under this Act,⁶⁷ as also to transfers in exercise of powers under s 24 of the Code.⁶⁸ So also, the provisions of s 100 of the Code of Civil Procedure 1908 relating to second appeals would be applicable to decrees passed under this Act. The scope of the second appeal would be the same as that under the Code of Civil Procedure 1908 and the High Court will not interfere with a finding of fact.⁶⁹ Section 151 of the Code of Civil Procedure 1908 was relied upon in the undermentioned case⁷⁰ relating to an application under s 10(2) after an application under O 9, r 13 had been dismissed for default.

PLEADING AMENDMENT

Absence of a pleading, in the facts and circumstances of a case, may become a serious and fatal mistake as pointed out by the Supreme Court in the undermentioned decision.⁷¹

64 *J Ananda v JB Narasimham* AIR 1975 All 80; however see *Pannou v Makroli Ram* AIR 1981 HP 47.

65 *Dal Chand v Swarn Pratap* AIR 1965 All 46; *Chander Prakash v Sudesh Kumari* AIR 1971 Del 208 (O 7, r 7).

66 *Asha Handa v Baldev Raj* AIR 1985 Del 76 (no specific denial of averments relating to cruelty).

67 *Tirukappa v Kamalamma* AIR 1966 Mys 1; *Gangadevi v Krishna Prasad* AIR 1967 Ori 19; *Susha Pande v Manohar Pande* AIR 1971 Bom 183 (O 22); *Sunanda v Venkata Subba Rao* AIR 1957 AP 424; *Sunanda v Gundopant* AIR 1961 Bom 225, 63 Bom LR 125; *Manjit Kaur v Gurdial Singh* AIR 1978 P&H 150; *Jang Bahadur Syal v Mukta Syal* AIR 1986 Del 422 (case law examined); *Ravindra v Pratibha* AIR 1987 MP 64; *Sahyogata Devi v Lalit Kumar* AIR 1985 P&H 349 (O 9, r 8 applied); contra *Anjan Kumar v Monakshi* AIR 1985 Gau 44; *Indira Kashyap v KW Kashyap* (1984) 3 SCC 107; (ordinarily there would be no scope to entertain a petition for special leave by the Supreme Court in a matter arising out of an application under O 9, r 13; *C Sarala v K Nalinakshan* AIR 1991 Ker 362 (O 9, r 9—appeals).

68 *K Poppammal v S Bhagawati* AIR 1985 Ker 91; *T Reddy v M Rao* AIR 1970 AP 194.

69 *Jiruban v Vengappa* AIR 1963 Mys 3; *Kusum Lata v Kampta Prasad* AIR 1965 All 280.

70 *Saraswati Devi v Nandan* AIR 1974 Pat 260; *Anupama v Bhagaban* AIR 1972 Ori 163.

71 *Saroj Rani v Sudarshan Kumar* AIR 1984 SC 1562 (Supreme Court disallowed an application for amendment of a pleading before it for permission to make an inconsistent case); *Sankara Prasad v Madhabi Paul* AIR 1982 Cal 474.

‘DECREE’: SECTION 2(2), CODE OF CIVIL PROCEDURE 1908

See notes under s 28.

INHERENT POWERS OF COURT: STAY OF PROCEEDINGS

In proceedings under the Act, the court regulates the same by the Code of Civil Procedure 1908, and if necessary will have recourse to its inherent powers under s 151 of Code of Civil Procedure 1908 on principles which are well-established. The court does not compel a wife who has obtained an order for maintenance pendente lite and costs under s 24, to take out execution proceedings where the order is not carried out by the other party and in case of proceedings by the husband for any relief under the Act will stay the same till the interim order is carried out.⁷² The court may, having regard to the facts and circumstances of the case and the conduct of the parties, even dismiss the appeal by a spouse who had failed wrongfully to comply with the orders under s 24 to pay litigation expenses and maintenance to the respondent wife.⁷³

EFFECT OF STAY OF SUBSTANTIVE PROCEEDINGS ON ORDERS OF INTERIM MAINTENANCE

The powers of the court to regulate the proceedings before it, is well-recognised. An important question as to such regulation of proceedings arises *qua* the rights of the wife to interim maintenance, in the eventuality that the substantive proceedings filed by the husband are stayed till the orders of interim maintenance are complied with. Different views have been expressed by high courts on this issue. The High Court of Delhi has expressed the view that proceedings for interim maintenance would not ensue once the substantive proceedings are stayed.⁷⁴ The Madras High Court has expressed a contrary view.⁷⁵ It appears that the former view is to be preferred to the latter. The consequential effect of stay of the main proceedings, it appears, is only that the husband is restrained from proceeding with the substantive proceedings, until such time as he complies with the order of interim maintenance. On this reasoning, it cannot be contended that the proceedings would be brought to an end, capable of revival conditionally,

⁷² *Anita v Biredra Chandra* AIR 1962 Cal 88; *Bhuneshwar Prasad v Dropta Bai* AIR 1963 MP 259; *Mulkan Rani v Krishna Kumar* AIR 1961 Punj 42; *Dr Tarlochan Singh v Mohinder Kaur* AIR 1963 Punj 249, (1963) 1 Punj 74; see *Halsbury's Laws of England*, 3rd edn, Vol 8, p 22; *Ramappa v Bojjappa* AIR 1963 SC 1633; *Ramchandra Rao v Kousalya* AIR 1969 Mys 76. Also see notes under s 24.

⁷³ *Ram Narain v Darupadi Devi* AIR 1983 Del 346.

⁷⁴ *Jai Rani v Om Prakash* AIR 1984 Del 381.

⁷⁵ *PS Devarajan v R Geetha* AIR 2000 Mad 440.

on compliance with the order of interim maintenance. The wording of s 24 of this Act is 'during the proceeding'. Such a stay, therefore, does not apparently put to an end to the proceedings, even during the pendency of the stay order. The petitioner would, therefore, be liable to comply with the order of payment of interim alimony. The contention that the proceedings have come to an end would have to be discountenanced and cannot ensue.

Even another reason mitigates against the former view. The heading of the section itself speaks about maintenance pendente lite. This itself is indicative of the fact that, it relates to interim payments during the pendency of the proceedings. Thus, even if the main proceedings are stayed, it only results in suspension of the same. The proceedings cannot be said to have come to an end, since they would conclude only on a final adjudication.

PROVISIONS OF THE ACT TOUCHING MATTERS OF PROCEDURE

There are some provisions of the Act which relate to procedure, and some which only incidentally affect procedural matters. Sections 19–28 of the Act are headed 'Jurisdiction and Procedure' and must particularly be referred to in all matters arising under the Act:

- | | |
|------------|--|
| Section 19 | deals with the question of jurisdiction; |
| Section 20 | lays down rules relating to contents and verification of petitions; |
| Section 21 | deals with power of the High Court to make rules regulating the procedure to be adopted in proceedings under the Act. Subject to such rules, all proceedings are to be regulated by the CPC; |
| Section 22 | permits of proceedings under the Act being conducted in-camera; |
| Section 23 | deals inter alia with the standard of proof and casts on the court the duty, where it is possible so to do, to endeavour to bring about a reconciliation between the parties; |
| Section 24 | deals with orders for maintenance pendente lite and costs; |
| Section 25 | deals with orders for permanent alimony and maintenance; |
| Section 26 | deals with matters affecting custody of minor children; |
| Section 27 | deals with matters affecting certain property which may jointly belong to the husband and wife; |
| Section 28 | relates to enforcement of decrees and orders and appeals against decrees and orders in proceedings under the Act. |

APPEAL

The principles on which a court of appeal interferes with findings of fact by the court of first instance are well-established. Equally well established

are the principles which guide the court of appeal when it is asked to examine orders passed by the court of first instance in the exercise of its discretion. Reference may be made to notes under s 28.

CO-RESPONDENT

Under the rules made by some of the High Courts, it is *inter alia* provided that in every petition for divorce or judicial separation on the ground that the respondent has committed adultery with any person, the petition 'shall' make such persons a co-respondent.⁷⁶ In the undermentioned case, it has been held that under the rules framed by the High Court of Punjab, an adultress joined as a co-respondent is neither a necessary, nor a proper party in a petition filed by a wife against her husband on ground of adultery.⁷⁷

INTERVENTION: POWER OF COURT TO ALLOW INTERVENTION ON TERMS

Section 31 of the Matrimonial Causes Act 1950, laid down the following rule:

In every case in which any person is charged with adultery with any party to a suit or in which the court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just.

The Special Marriage Act 1954, does not contain any similar provision, but s 41 of that enactment in recognising the power of the High Court to make rules regulating procedure draws particular attention to the desirability of framing rules on the question of 'intervention' in certain proceedings by any person not already joined as a party.

Rules framed by some of the High Courts under the present Act do not provide for 'intervention'. Where the rules framed by a High Court under the present Act do not contain any provision on the question of intervention, doubt may arise whether it would be competent to the court under O 1, r 10(2) of the Code of Civil Procedure 1978, to permit intervention by any person not joined as a party to the proceeding. Serious doubt was raised about the power of the court in this behalf in some matters arising under the Divorce Act 1869.⁷⁸ It would be clearly in the interest of justice that a party who is named in proceeding under the suit as being a person with

⁷⁶ *Maganlal v Dahi* AIR 1971 Guj 33.

⁷⁷ *Sarla v Shakuntala* AIR 1966 Punj 337; *Kharaiti Lal v Pushpa Rani* AIR 1973 P&H 271 (no abatement of appeal).

⁷⁸ *Stuart v Stuart* (1935) 57 All 884; *Ramsay v Boyle* (1903) 30 Cal 489.

whom the respondent is alleged to have committed adultery should be allowed to intervene and defend his or her character against the aspersions which have been made in the petition. The question is one of importance, and it is submitted that the power of the court *ex proprio motu* to direct addition of a proper party in order to enable it effectually and completely to adjudicate upon and settle all the question in the matter, under sub-r (2) of O 1, r 10 of the Code of Civil Procedure 1908, if liberally interpreted, is wide enough to enable it to direct addition of any such party.

DAMAGES

Rules framed by some High Courts contain express provisions relating to granting of damages against a co-respondent. The question may arise whether in the absence of any such special rule, the court can, in proceedings under the Act, grant damages against a co-respondent. It is submitted that the court would lean in favour of the exercise of such power though the matter is not entirely free from doubt. In *Jaswantrai v Vimal Vaidya*, it was held that no such claim can be joined in a proceeding under the Act since the rules framed by the Bombay High Court (applicable in Gujarat) did not contain any such provision.⁷⁹

RES JUDICATA

As a general rule the doctrine of res judicata applies as much in matrimonial cases as in others. It is sometimes said that in matrimonial jurisdiction since public interest is an important consideration the matter is not concluded by *estoppel per rem judicatam*, and the doctrine cannot operate against a party so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly before the court.⁸⁰ This principle of public interest is sound by itself, but apt to create some misapprehension. The question whether the trial of any matrimonial cause or any issue is barred by res judicata or not must be decided by reference to s 11 of the Code of Civil Procedure 1908 bearing in mind that the section is not exhaustive of the circumstances in which an issue may be res judicata. The application of the rule by the court, as is now well-settled, should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law. 'Charges which have been unsuccessfully put forward and disposed of in one suit, cannot be repeated in a second between the same parties; for not only does the common law doctrine of estoppel apply, but

⁷⁹ AIR 1963 Guj 152; *Rajalingam v Lingayya* AIR 1964 AP 308 (19 of the High Court Rules).

⁸⁰ *Hudson v Hudson* [1948] P 292-93, [1948] 1 All ER 773.

since in matrimonial causes a wife usually brings her suit at the expense of her husband, a repetition of charges would act as a peculiar hardship. The rule applies not only to the actual point of decision in the previous case, but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.⁸¹

A distinction, however, must be made between *res judicata* as against a party charged with a matrimonial offence, and as against a party putting forward a charge against the opposite party. It is one thing to say that a party who brings charges is not entitled to repeat allegations which have already been the subject of previous proceedings and have already been determined against him or her, and another to say that a party should not be prevented from denying charges brought against him. For in the latter case, the statutory duty on the court, to inquire into the truth of a petition which is properly before it, intervenes and a party is not prevented from denying charges and the court sees that relief is not improperly obtained by a petitioner merely through some technical rule.⁸²

A wife filed a petition for relief on the ground of her husband's adultery and cruelty. The charges were denied and her petition was dismissed. She then filed a petition for relief on the ground of the husband's desertion. It was held that: (i) since the allegation of adultery had been dismissed in the previous petition she could not now allege that she had reasonable grounds for belief in such adultery; (ii) the allegations of threats of violence and of actual assault, which repeated the allegations in the previous petition, had been held not to amount to cruelty and could not now be relied on as 'grave and weighty matters' to support a charge of constructive desertion; (iii) other allegations relied on as constructive desertion were such as could and should have been raised in the earlier proceeding in support of charge of cruelty and not having been specifically raised they could not now be relied on; (iv) but the remaining allegation of desertion *simpliciter* had not been investigated in the former petition and could be tried in the second petition.⁸³

The undermentioned cases afford some illustrations of the applicability and inapplicability of the doctrine of *res judicata* in matrimonial cases.⁸⁴

81 This statement of the law given in an unexceptionable way in *Rayden on Divorce* was quoted with approval in a case: *Bright v Bright* [1953] 2 All ER 939, 947; *H v H* (1928) 30 Bom LR 523.

82 *Bright v Bright* [1953] 2 All ER 939, 946.

83 *Ibid.*

84 *Krishna Pillai v Subhadra Amma* AIR 1971 Ker 44 (judgment *in rem* and *res judicata*); *Siddaiah v Penchalamma* AIR 1963 AP 158 (previous decision by *munsiff's* court in a suit for maintenance inoperative as *res judicata* in subsequent suit for judicial separation), *Kusum Lata v Kampta Prasad* AIR 1965 All 280

continued on the next page

Reference may usefully be made to the general observations relating to the doctrines of *res judicata* and *estoppel* in the undermentioned decision of the Supreme Court.⁸⁵ It was also pointed out in this case that *estoppel* is often described as a rule of evidence, the whole concept is more correctly viewed as a substantive rule of law. As to not impleading of adulterer, despite knowledge and delay, reference may be made to the undermentioned case.⁸⁶

COSTS

In matrimonial causes, costs are in the absolute discretion of the court and in determining whether an unsuccessful husband or wife should be directed to pay the costs of the other party, each case must be considered on its own merits and there is some indication in the Act itself that the discretion of the court being unfettered, it may have regard to the question whether the unsuccessful spouse has separate means sufficient to pay the costs.⁸⁷ The practice under analogous enactments has been not to make any order for costs against an unsuccessful wife, unless she has separate means sufficient to pay the costs. Where her petition was groundless or if she had made wild charges against the husband the court took that into consideration and not only refused to make any order for costs in her favour, but mulcted her in costs.⁸⁸ The scheme of the present enactment is not to sanction any practice as to costs simply for the reason that such practice was followed under other analogous legislation, but to leave the matter of costs to the discretion of the court and treat both the husband and wife on the same footing as would appear from s 24. In any proceeding under the Act, the court, it is submitted, would not subscribe to any set practice, but would consider each case on its own merits and in exercising its discretion, would have regard to the conduct of the parties; the means of the parties; the blame to be apportioned to one or other of the spouses for the break-up of the matrimonial home; and the attitude taken up by the parties in the conduct of the proceeding itself.

Reference is invited to the undermentioned decision.⁸⁹

(consolidation of proceedings and *res judicata*): *Manjit Kaur v Gurdial Singh* AIR 1978 P&H 150 (s 10 application dismissed for default: subsequent application under s 13 on same cause of action held barred); *Parkash Chand Gupta v Kamla Gupta* AIR 1979 Del 83.

85 *Vijayalakshmi v Ramachandra* AIR 1981 SC 1143.

86 *Rabindra Prasad v Sita Devi* AIR 1986 Pat 128.

87 See s 24.

88 *Milne v Milne & Fowler* (1971) 1 R 2 P & D 202, 204; *Millward v Millward* (1887) 57 LT 569-70, *Barker v Barker* [1950] 1 All ER 812; *Noronha v Noronha* (1948) 50 Bom LR 477.

89 *Ram Pal v Ansha* AIR 1994 Raj 204 (costs not prayed for in trial or appellate court, only costs of second appeal awarded).

21A. Power to transfer petitions in certain cases.—(1) Where—

- (a) a petition under this Act has been presented to a district court having jurisdiction by a party to a marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13; and
- (b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under section 10 or for a decree of divorce under section 13 on any ground, whether in the same district court or in a different district court, in the same state or in a different state;

the petitions shall be dealt with as specified in sub-section(2).

(2) In a case where sub-section (1) applies,—

- (a) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;
- (b) if the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the court or the Government, as the case may be, competent under the Code of Civil Procedure 1908 (5 of 1908), to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

This section was inserted by the Amending Act of 1976. It relates inter alia to transfer of petitions in certain cases. It has been held by the Supreme Court⁹⁰ overruling the undermentioned cases⁹¹ that ss 21 and 21A above, do

⁹⁰ *Vijayalakshmi v Ramachandra* AIR 1981 SC 1143; *T Ramadevi v TV Subramanyam* AIR 1982 AP 10; *Ved Parkash v Seema* AIR 1988 P&H 75 (transfer of petitions); *Sunita Bali v Ashok Bali* (1987) Raj 79 (city civil court); *Seema Shrinidhi v Praveen Kumar Tiwari* AIR 1999 SC 1560.

⁹¹ *Prayavati Mehta v Priyanath Mehta* AIR 1980 Bom 337; *Rama Kanta v Ashok Kumar* AIR 1977 P&H 373; *Pritikona Banerjee v Rabi Shankar Banerjee* AIR 1987 Cal 269.

not in any way exclude the jurisdiction conferred on the Supreme Court by the present s 25 of the Code of Civil Procedure 1908. This section does not exclude the general provisions in the Code of Civil Procedure relating to transfer. Attention is invited to the undermentioned decision.⁹²

21B. Special provision relating to trial and disposal of petitions under the Act.—(1) The trial of a petition under this Act shall, as far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion unless the court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent.

This section was inserted by the Amending Act of 1976. It is intended to ensure expeditious disposal of proceedings.

21C. Documentary evidence.—Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence in any proceeding at the trial of a petition under this Act on the ground that it is not duly stamped or registered.

This section was inserted by the Amending Act of 1976. It provides for admissibility of documents even if not duly stamped or registered.

22. Proceedings to be *in camera* and may not be printed or published.—

(1) Every proceeding under this Act shall be conducted *in camera* and it shall not be lawful for any person to print or publish any matter

⁹² *Mamta Gupta v Mukand Kumar Gupta* AIR 2000 AP 394 (on facts transfer declined for lack of jurisdiction), *Chander Kanta v Mohinder Pal Dogra* AIR 2003 P&H 255 (transfer declined).

in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.

AMENDMENT

This section was amended by the Amending Act of 1976. It is now obligatory that all proceedings under the Act should be conducted *in camera*.

HEARING IN CAMERA

The section lays down certain limitations on the general rule that all suits—including matrimonial suits—should be heard in open court,⁹³ and that every court of justice should be open to every person. In *Scott v Scott*,⁹⁴ which is the leading English decision on the subject, the view was expressed that the general rule as to publicity must yield to the paramount duty of the court to secure justice. The rule was not based on the ground of public decency, but on the principle that in some cases the administration of justice would be rendered impracticable by the presence of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the court.⁹⁵

Before the amendment, the rule was that if either party so desired the proceedings under the Act must be conducted *in camera*. Even where no such desire was expressed by any party the court could in its discretion direct that the proceedings shall not be in open court. The rule is now substituted for the amended rule which makes it now obligatory that all the proceedings under the Act should be held *in camera*.

RESTRICTION ON PUBLICATION AND NEWSPAPER REPORTS

The section also lays down the strict rule that it shall not be lawful for any person to print or publish any matter relating to any proceedings under the Act (including newspaper reports), except that a judgment of a high court or of the Supreme Court may be printed or published with the previous permission of such court. The rule is enacted so that reports of judicial

⁹³ Cf Code of Civil Procedure 1908, O 18, r 4.

⁹⁴ *Scott v Scott* [1913] AC 417; *Mc Pherson v Mc Pherson* (1936) 38 Bom LR 468 (PC); *Cleland v Cleland* (1913) LT 744; *Re Martindale* [1894] 3 Ch 193.

⁹⁵ See per Lord Loreburn in *Scott v Scott* [1913] AC 417.

proceedings relating to marital disputes may not produce an unhealthy influence on the public and to control those who cater to the prurient-minded members of the public who revel in the unsavoury details of such cases. Any violation of the rule relating to printing and publication of any such matter has been made punishable under sub-s (2). In England there is a special enactment, the Judicial Proceedings (Regulation of Reports) Act 1926, which regulates the publication of any particulars relating to matrimonial suits. Names of the parties, concise statement of the charges, decision of the court and some other matters are however, permitted to be published and the restrictions are substantially confined to indecent details calculated to injure public morals. The present section lays down that nothing in relation to any such proceeding can be printed or published except as permitted under sub-s (2).

23. Decree in Proceedings.—(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

- (a) any of the grounds for granting relief exists and the petitioner except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5 is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief; and
 - (b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and
 - (bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence; and
 - (c) the petition not being a petition presented under section 11 is not presented or prosecuted in collusion with the respondent; and
 - (d) there has not been any unnecessary or improper delay in instituting the proceeding; and
 - (e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.
- (2) Before proceeding to grant any relief under this Act, it shall be the

duty of the court in the first instance, in every case where it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about reconciliation between the parties:

Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clauses (ii), (iii), (iv), (v), (vi) or clause (vii) of sub-section (1) of section 13.

(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper to do so, adjourn the proceedings for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person, with directions to report to the court as to whether reconciliation can be and has been, effected and the court shall in disposing of the proceedings have due regard to the report.

(4) In every case where a marriage is dissolved by a decree of divorce, the court passing the decree shall give a copy thereof free of cost to each of the parties.

AMENDMENT

Section 23 before its amendment by the Amending Act of 1976 was as under:

23. Decree in proceedings.—(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

- (a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief; and
- (b) where the ground of the petition is the ground specified in cl (f) of sub-s (1) of s 10, or in cl (I) of sub-s (1) of s 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and
- (c) the petition is not presented or prosecuted in collusion with the respondent; and
- (d) there has not been any unnecessary or improper delay in instituting the proceeding; and
- (e) there is no other legal ground why relief should not be granted, then and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

POWER AND DUTY OF THE COURT

The section contains some vital clauses of considerable importance and consequence relating to the power and duty of the court in the matter of granting any of the reliefs recognised under the Act.

The initial words of the section adopt the well-established principle of matrimonial law that decrees of dissolution of marriage are to be made only upon strict proof. Apart from a case covered by s 13B inserted by the Amending Act of 1976, which relates to decree of divorce by mutual consent in the manner provided in that section, consent to a decree, direct or indirect, is not permissible. Proceedings under the Act are not of the character of ordinary suits and the standard of proof required is that the court must be satisfied that the ground for relief is established beyond reasonable doubt. It makes no difference whether the proceeding is defended or not. The court must vigilantly see that all the requirements of law are fulfilled and the safeguards provided in the section are duly observed. The language employed in sub-s (1) clearly shows that cl (b)–(e) and the latter part of cl (a) lay down certain absolute bars to the granting of any relief under the Act. The words at the close of sub-s (1) ‘then, and in such a case, but not otherwise, the court shall decree such relief accordingly’ emphasise that relief in any proceeding under the Act cannot be granted to a petitioner who is in any way taking advantage of his or her own wrong or disability for the purpose of such relief. Such conduct or disability is an absolute bar to the petitioner’s right to seek relief from the court. The words also emphasise that connivance, condonation, collusion and unnecessary or improper delay are absolute bars to the granting of relief where they apply to the particular ground on which relief is sought.

Sub-section (1) in effect lays down the following rules:

- (i) A decree for restitution of conjugal rights,⁹⁶ judicial separation,⁹⁷ declaration of nullity of marriage,⁹⁸ annulment of voidable marriage,⁹⁹ or divorce¹ can be granted only when any ground for granting the relief asked for is established to the satisfaction of the court. (See ‘Standard of Proof’ *infra*.)

⁹⁶ Section 9.

⁹⁷ Section 10.

⁹⁸ Section 11.

⁹⁹ Section 12.

¹ Section 13.

- (ii) No relief can be granted to the petitioner if any of the absolute bars apply to the facts of the case.
 - (a) The petition must be dismissed if the court is satisfied that the petitioner, though able to establish the ground for granting relief, is in any way taking advantage of his or her own wrong or disability for the purpose of such relief as envisaged in cl (a).
 - (b) The petition must be dismissed if the court is not satisfied that the petitioner has not in any manner been accessory to or connived at or condoned the act or acts of adultery where the petition is on that ground,² or has not in any manner condoned the cruelty where the petition is on the ground (cl (b)).
 - (c) The petition must be dismissed if the court is not satisfied that there is no collusion between the parties as envisaged in cl (c).
 - (d) The petition must be dismissed if the court is not satisfied that there has not been any unnecessary or improper delay in instituting the proceeding [cl (d)].
 - (e) The petition must be dismissed if there is any legal ground for not granting the relief (cl (e)).
- (iii) Where the court is satisfied that any ground for granting the relief asked for exists and is also satisfied that none of the bars laid down in the sub-section apply to the facts of the case, it *shall decree such relief*.

STANDARD OF PROOF: CORROBORATION

It is a firmly established rule that the ground for relief in a matrimonial cause should be strictly proved. Reference has already been made to the subject under the heads of desertion,³ cruelty,⁴ and adultery.⁵ The standard of proof in case of all proceedings under the Act is that the court must be satisfied on a preponderance of probability that the ground for relief is proved and normally, the court requires that the evidence of a spouse who charges the other spouse with a matrimonial offence should be corroborated. While the analogies and precedents of criminal law should have no authority in matrimonial causes, the court would ordinarily, be justified in requiring, not as a matter of law but as a rule of prudence, that where possible, corroborative evidence should be led in order to satisfy the court that the allegations made are well-founded. As for corroboration in case of adultery, it has been

² See s 10(1)(f) and s 13(1)(i).

³ See under 'Desertion and Cruelty' *supra*.

⁴ *Ibid*.

⁵ See under 'Adultery' *supra*.

observed that corroboration must be independent testimony which connects or tends to connect the offending spouse with the offence. Evidence of mere opportunity is not sufficient to constitute corroboration, since opportunity may or may not be used.⁶ There is nothing, however, to prevent the court from passing a decree even on uncorroborated testimony of the petitioner. The background of the case and surrounding circumstances may often furnish some corroborative evidence. In *Bipin Chander v Prabhavati*⁷ the Supreme Court referred to the law on the subject in England and observed that though corroboration is not required as an absolute rule of law in proof of matrimonial offences, the court insists upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court.

The section requires that before decreeing any relief in any proceedings under the Act, the court must be satisfied—

- (i) that the ground for relief exists, meaning thereby that it is established; and
- (ii) that to the granting of such relief, there is no bar of any kind mentioned in the section.

The expression 'satisfied' used in similar context has come up for consideration in England and the question has been discussed whether 'satisfied' meant something less than 'satisfied beyond reasonable doubt'. It would seem from recent decisions that the courts in England have come down on the side of the view that there is no distinction to be drawn between 'satisfied' standing alone and the same expression accompanied by the words 'beyond reasonable doubt'. The present section itself lays down a standard and puts adultery, cruelty and other matrimonial offences on the same footing. What is required is that there should be a strict inquiry into the matter. It is submitted that the word 'strict' is sufficiently apt to describe the standard and measure of proof. The evidence must satisfy what has been described the 'guarded discretion of a reasonable and just man'. As will be presently pointed out, the word 'satisfied' in this section must mean 'satisfied on a preponderance of probabilities'.

In the Supreme Court case of *Bipin Chander v Prabhavati* supra (decided under a different enactment), it was observed that it was well-settled that in proceedings for divorce the petitioner must prove the alleged offence beyond all reasonable doubts. The following observation by Lord Macdermott

⁶ *Senat v Senat* [1965] 2 All ER 505 and cases cited therein.

⁷ AIR 1957 SC 176, *Vira Reddi v Kistamma* AIR 1969 Mad 235, *William v William* AIR 1934 Pat 475 (cruelty), *Bipoli Chaudhuri v Sukomal Chaudhuri* AIR 1970 Cal 87 (cruelty), *Joseph v Ramamma* (1922) 45 Mad 982 (adultery), *Jyotish Chandra v Meera Guba* AIR 1970 Cal 269 (adultery), *Sachindramath v Nilma* AIR 1970 Cal 38, *Galler v Galler* [1954] 1 All ER 536, *Fairman v Fairman* [1949] 1 All ER 938, [1949] P 341, *Kailash Kumari v Mannmohan Kapoor* AIR 1975 J&K 95, *Veeraraghavan v Parvathy* AIR 1974 Ker 43 (desertion).

in a case decided by the House of Lords in England⁸ should prove useful:

The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be satisfied, in respect of a ground for dissolution, with something less than proof beyond reasonable doubt.

In *White v White*,⁹ also decided under a different enactment, the Supreme Court was in general agreement with the decision of the House of Lords in *Preston Jones v Preston Jones*¹⁰ as laying down the correct test that the court must be satisfied beyond reasonable doubt does not mean proof beyond the shadow of a doubt. It need not amount to certainty. The Supreme Court had also accepted this principle of proof beyond reasonable doubt in *Bipin Chander v Prabhavati*¹¹ decided under a different enactment. In England, however, in a later decision in *Blyth v Blyth*,¹² some judges in the House of Lords have expressed the view that the word 'satisfied' did not mean satisfied beyond reasonable doubt and a matrimonial offence could be proved by a preponderance of probability and that the degree of probability depended on the gravity of the offence on the principle that 'in proportion as the offence is grave so ought the proof to be clear'. In *Bastable v Bastable*,¹³ the Court of Appeal in England observed that this principle should be applied until the matter has been further considered by the House of Lords and further guidance had been received.

In *Dastane v Dastane*, the Supreme Court¹⁴ has held that proceedings under the Act being essentially of a civil nature, the word 'satisfied' in this section must mean 'satisfied on a preponderance of probabilities' and

8 *Preston Jones v Preston Jones* [1951] AC 391, [1951] 1 All ER 124, 138, Lord Simmonds expressly adopted this language; *Blyth v Blyth* [1966] 1 All ER 524 (HL).

9 AIR 1958 SC 441.

10 *Preston Jones v Preston Jones* [1951] AC 391, [1951] 1 All ER 124, 138, Lord Simmonds expressly adopted this language; *Blyth v Blyth* [1966] 1 All ER 524 (HL).

11 AIR 1957 SC 176; *Blyth v Blyth* [1966] 1 All ER 524 (HL), [1966] AC 643; *Bastable v Bastable* [1968] 3 All ER 701; *Sachindranath v Nilima* AIR 1970 Cal 38; *Narayanan v M Parukutty* AIR 1973 Ker 171. In *Subrata Kumar v Dipti Banerjee* AIR 1974 Cal 61, 66, it has been observed that 'the conscience of the court should be satisfied' before holding that adultery has been committed. The legal position must now be taken as laid down by the Supreme Court in *Dastane v Dastane* AIR 1975 SC 1534; *Saroj Kalyan Kanta* AIR 1980 Cal 374 (earlier decisions of the same High Court no longer good law); *Mani Shankar v Radhadevi* AIR 1992 Raj 33 (adultery can be proved by preponderance of probabilities).

12 [1966] 1 All ER 524 (HL), [1966] AC 643.

13 [1968] 3 All ER 701.

14 AIR 1975 SC 1534; *Kamal v Ramchandra* (1978) Mah LJ 598; *Gauri Dey v Bidhu Bhushan Dey* AIR 1986 Gau 22; *Swayamprabha v Chandrasekhar* AIR 1982 Kant 295; *DP Gopala v Pushpaveni* AIR 1982 Kant 329.

not 'satisfied beyond a reasonable doubt'. The satisfaction of the court must, ofcourse, be based on legal evidence.

ADMISSIONS

It is not unusual to find observations in some decided cases to the effect that judgment by admission is unknown to matrimonial cases. The court insists on strict proof of the matrimonial offence. Therefore, as a matter of practice, it does not act on a mere admission or confession, unless there is corroboration. There is, however, no absolute rule of law of evidence which precludes the court from acting on an admission. Of course, considerable caution is required and the court will act on any such admission only after ruling out the possibility of any collusion. In *Mabendra v Sushila*,¹⁵ the Supreme Court observed:

Admissions are to be ignored on grounds of prudence only when the court, in the circumstances of a case, is of the opinion that the admissions of the parties may be collusive. If there be no ground for such a view, it would be proper for the court to act on those admissions without forcing the parties to lead other evidence to establish the facts admitted, unless ofcourse the admissions are contradicted by the facts proved or a doubt is created by the proved facts as regards the correctness of the facts admitted.

The court should endeavour to examine that grounds for relief exist, even in case of admissions, and try to act under this section in order to corroborate any admission. The passing of a decree without resorting to this section has been held to be illegal.¹⁶

NO DECREE MERELY BY CONSENT OF PARTIES

It is a well-established rule of matrimonial jurisdiction that no judgment for dissolution of marriage can be obtained by consent of parties (apart, of course, from s 13B) and it has repeatedly been said that judgment by default or by consent is unknown in matrimonial causes. Consent to a decree, direct or indirect, is inadmissible as was observed by the House of Lords in the undermentioned case.¹⁷ A decree for restitution of conjugal rights may, however, stand on a somewhat different footing. It has been held by a Full Bench of the High Court of Punjab and Haryana that a consent decree can be passed in such a case in certain circumstances and it will depend upon the facts of each individual case whether such a decree is good decree or

¹⁵ AIR 1965 SC 364, 372.

¹⁶ *Leela v Sachendra* AIR 1994 MP 205.

¹⁷ *Russell v Russell* [1924] AC 687, 736.

not, and if it is so passed it will not amount to a nullity.¹⁸ This view has, however, been dissented from by the Calcutta High Court.¹⁹ The court has held that such a decree can be passed only if the grounds set out in ss 23(1)(a) and (e) are satisfied. This view was taken by the court, for according to the learned judges, the Supreme Court had held in *Reynold Rajamani*²⁰ that when certain grounds are specified by the legislature for grant of a decree of divorce, such grounds are the only ones on which a decree of divorce can be granted. It can form the basis of divorce proceedings under s 13(1A)(ii). However, it has been held that, a decree for judicial separation passed merely by consent of parties cannot be regarded as valid and the court may decline to grant decree for divorce under s 13(1A)(i) in case of any such consent decree.²¹ This view expressed by the Allahabad High Court, has been dissented from, in a recent decision of the High Court of Andhra Pradesh. That High Court has held that decrees in matrimonial proceedings cannot be treated as collusive, and as such, when a petition for dissolution of a marriage, on the ground of non-resumption of cohabitation, from one year upwards, from the passing of the decree for judicial separation, the spouse is not disentitled to a decree of divorce.²² This view has been expressed, based on the decision of the Supreme Court in *Saroj Rani v Sudarshan Kumar*,²³ which confirms the decision of the Punjab & Haryana High Court in *Joginder Singh v Pushpa*.²⁴

False defence

In matrimonial proceedings, the court is so vigilant to see that the burden of proof is properly discharged by the petitioner that though the putting forward of a false defence may destroy the respondent's credibility, that in itself is not regarded as sufficient to establish the truth of the petitioner's case. The court does not ignore the possibility that a spouse 'conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication or worse'.²⁵

Though not determinative of the case, the court can take into consideration the fact that the respondent had put forward a false defence. It may do so

18 *Joginder Singh v Pushpa* AIR 1969 P&H 397.

19 *Apurba v Manashi* AIR 1989 Cal 115.

20 *Reynolds Rayamani v Union of India* AIR 1982 SC 1261, 1263.

21 *Hirakali v Awasthi* AIR 1971 All 201.

22 *AV Janardhana Rao v M Aruna Kumari* AIR 2000 AP 127.

23 AIR 1984 SC 1562.

24 AIR 1969 P&H 397(FB).

25 *Preston Jones v Preston Jones* [1951] AC 391 per Lord Normand at p 405; *Bipinbhadra v Prabhavati* AIR 1957 SC 176, 188; *Sachindranath v Nilima* AIR 1970 Cal 38.

in examining the probabilities of the case and in assessing the case of the petitioner.²⁶

‘...WHETHER DEFENDED OR NOT’

A decree in any matrimonial proceeding under the Act is to be made only upon strict proof of the ground relied upon by the petitioner and it makes no difference whether the proceeding is defended or not. In an ex parte case, it is not enough for one of the parties to come forward and say something exactly following the terms of the Act. The proper course for the court, in an undefended proceeding, is to ask sufficient questions to make it reasonably clear what the precise facts are on which the petitioner relies for the relief that is claimed.²⁷ The court must watch vigilantly to see that the evidence on which it acts is such only as it is entitled to receive. The fact that by allowing the proceedings to go undefended, both the parties appear to be equally anxious to see that relief is granted is precisely a reason why the court should be strict as to proof. No consideration of saving time and trouble can be a legitimate ground for admitting evidence that is inadmissible.²⁸ The court must also satisfy itself that the safeguards provided in the section are duly observed and insist upon corroborative evidence in proof of a matrimonial offence.²⁹

DISCRETION OF THE COURT: ‘...THEN, AND IN SUCH A CASE, BUT NOT OTHERWISE, THE COURT SHALL DECREE SUCH RELIEF ACCORDINGLY’

A question of considerable importance and some difficulty must arise as to whether the language of the present section recognises any discretion in the court in the matter of granting or withholding relief in cases where the ground for granting relief exists and none of the absolute bars laid down in the latter part of cl (a)–(e) apply to the facts of the case. As already pointed out,³⁰ the language employed in sub-s (1) clearly shows that it lays down certain absolute bars to the granting of any relief. If the court disregards any of them, the decree that may be passed would be irregular and contrary to law. In the undermentioned cases such decrees have even been characterised as nullity.³¹ The words of sub-s (1) ‘...then, and in such a case,

26 *Vira Reddi v Kistamma* AIR 1969 Mad 235; *Mahendra v Sushila* supra.

27 *Walsh v Walsh* (1927) 29 Bom 308, 310; *Alopbai v Rampal* AIR 1962 MP 211.

28 *Russell v Russell* [1924] AC 687, 736.

29 *Anupama v Bhagaban* AIR 1972 Ori 163.

30 See notes under ‘Power and duty of the court’.

31 *Hirakshi v Anashti* AIR 1971 All 291; *Anupama v Bhagaban* AIR 1972 Ori 163; *Manilal v Gangaben* AIR 1979 Guj 98.

but not otherwise, the court shall decree such relief '*accordingly*' suggest that the Legislature has in the present section, given a complete enactment and where none of those bars can be shown to apply to the facts of the case, the court is bound to give relief and has no discretion to withhold the same. The identical words '...then, and in such a case, but not otherwise, the court shall decree such relief accordingly' are used in sub-s (1) of s 34 of the Special Marriage Act 1954, which deals with duty of court in passing decrees in proceedings under that Act. The language of cll (b), (d), (e) and (f) of that section is practically identical with that employed in cll (b)–(e) of the present section. However, s 34 of that Act does not contain any rule similar to that in the latter part of cl (a) of the present section which prevents a petitioner from taking advantage of his or her own wrong or disability even though the ground for relief may be shown to exist. That section read with s 35 of that Act although it does not in terms so state would seem to leave it to the court to decide whether relief should or should not be granted to a petitioner who for instance is himself or herself shown to have been guilty of adultery, cruelty or desertion. In any such case, the court may give to the respondent the same relief to which she or he would have been entitled if she or he had presented a petition seeking such relief. In England, s 4 of the Matrimonial Causes Act 1950, contains the provision that the court is not bound to pronounce a decree of divorce (nor a decree for judicial separation) and may *dismiss* the petition if it finds that the petitioner has been guilty:

- (i) of adultery committed during the marriage; or
- (ii) of unreasonable delay in presenting or prosecuting the petition; or
- (iii) of cruelty towards the other party to the marriage; or
- (iv) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself, from, the other party before the adultery or cruelty complained of; or
- (v) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

It will be noticed that the court in England has a discretion in all such cases to grant or withhold the relief claimed by the petitioner, even though the ground for relief complained of may be established. Decisions in England show that the discretion vested in the court, though said to be regulated discretion, is in a way unfettered. In *Blunt v Blunt*,³² the House of Lords adopted the view that the matters to be considered in the exercise of this discretion cannot be reduced to any rules of an exhaustive character and the utmost that can be properly done is to indicate the chief considerations

³² [1943] AC 517, [1943] 2 All ER 76.

which ought to be weighed in appropriate cases as helping to arrive at a just conclusion. There are, on the other hand, judicial statements of the nature that a loose and unfettered discretion of this sort upon matters of such grave import is a dangerous weapon and its exercise is likely to be the refuge of vagueness in decision and the harbour of half-formed thoughts; and that under cover of the word 'discretion', a conclusion is apt to be formed upon a general impression of facts, too numerous and minute to be perfectly brought together and weighed and sometimes, not perfectly provided.³³ Perhaps these considerations weighed with the legislature in not adopting the rule of English law on the subject or that in the Indian Special Marriage Act 1954, to cases to be decided under the present Act. It will also be noticed that the latter part of cl (a) of the present section deals substantially with cases of the nature where discretion is exercised by the court in England on the ground of any wrong or misconduct of the petitioner and enacts that a decree shall not be granted to a petitioner who is in any way taking advantage of his or her own wrong or disability for the purpose of the relief. The scheme and framework of the English enactment, the Indian Special Marriage Act 1954, and the present Act are not identical and little, if any assistance is to be derived from the knowledge that under the analogous enactments, a measure of unfettered discretion is vested in the court. To ascertain the law under the present enactment, it is necessary to consider the present section as it is and it is submitted that no such discretion as hitherto understood can be exercised by the court in cases to be decided under the present Act; and even though it may appear that both the parties are in the wrong, relief should not be denied to the petitioner where the court is satisfied that the ground for relief has been established and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief. Reference may be made to notes under cl (a) *infra*.

CLAUSE (A): '...TAKING ADVANTAGE OF HIS OR HER OWN WRONG OR DISABILITY... '

The latter part of cl (a), read with the words at the end of sub-s (1): 'then and in such a case, but not otherwise' makes it abundantly clear that the court cannot pass a decree granting any relief under the Act in favour of a petitioner who is in any way taking advantage of his or her own wrong or disability for the purpose of such relief and it is not enough that the petitioner has established the ground on which relief is sought; and if that is so, his or her own wrong or disability is an absolute bar to the relief sought by the petitioner. The rule is based on the principle of justice that a wrongdoer should not be permitted to take advantage of his or her own

³³ *Morgan v Morgan* (1869) LR 1P & D 644.

wrong or disability while seeking relief at the hands of the court in any matrimonial proceeding. Thus for instance, relief on the ground of adultery of the respondent, cannot be granted to a petitioner whose own adultery or any other wrong (such for example 'desertion') has in any serious degree contributed to the misconduct of the respondent. Similarly, no relief can be granted to a petitioner—where the ground of the petition is adultery or unsoundness of mind or desertion and the petitioner has been guilty of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion; or where the ground of the petition is cruelty, the petitioner was himself or herself guilty of extreme provocation or of cruelty, or had without reasonable excuse deserted, or separated himself or herself from the respondent, and it appears that in seeking relief from the court on any of these grounds, the petitioner is taking advantage of his or her own wrong. However, this inhibition would not apply to the case of a party who merely seeks to avail of a statutory benefit or advantage open to him under any provision of the act.³⁴

The 'wrong'³⁵ of which a petitioner may be said to take advantage and which disentitles him or her to relief under the act even if the ground on which the petition is founded is established, though a compendious and a broad phrase, must be understood in a restrictive sense. Reference may be made to notes under s 13(1A)(i) and (ii) and the decision of the Supreme Court in *Dharmendra Kumar v Usha Kumar*,³⁶ where it was observed:

In order to be a 'wrong' within the meaning of...[this clause], the conduct...alleged must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

As held by the Supreme Court in the above decision, the misconduct must be serious enough to so as to deny relief. In a recent case before the Supreme Court,³⁷ it was held that after passing of a decree of judicial

³⁴ For instance under s 13(1A)(ii).

³⁵ The mere fact that a wife was living separate from her husband will not disentitle her from seeking divorce on the ground (s 13(2)) that the husband had married a second wife in case of a marriage solemnised before the Act came in operation: *Mohanlal v Mohan Bai* AIR 1958 Raj 71.

³⁶ AIR 1977 SC 2218, 2220; *OP Mehta v Saroj Mehta* AIR 1986 Del 327 (husband made it impossible for wife to resume cohabitation after restitution decree); *Sunita Nikalje v Rajendra* AIR 1996 Bom 85 (or reluctance to accept the other spouse—cannot suffice); *T Srinivasan v T Varalakshmi* AIR 1999 SC 595 (restitution in favour of husband—wrongs by husband thereafter—husband not entitled to decree of divorce); *Swapna Chakrawarti v Viplay Chakrawarti* (Dr) AIR 1999 MP 163 (husband guilty of adultery, but stating that wife refused to live with him—not entitled).

³⁷ *Hirachand Srinivas Managaonkar v Sunanda* JT 2001 (3) SC 620 (overruling *Sumitra Manna v Gobinda Chandra Manna* AIR 1988 Cal 192, which proceeded on a narrow construction). *Baimani v Jayantila Dahyabhai* AIR 1979 Guj 209 (overd).

separation, it was expected that the husband and wife would act dutifully towards each other. The husband not only continued his adulterous relationship after the decree of judicial separation, but refused to pay the amount of maintenance as directed. While not laying down a straightjacket formula or a general principle of universal application, the Supreme Court on the facts of the case, held that such refusal of maintenance to the wife and biding time for the expiry of one year after the decree of judicial separation was a matrimonial 'wrong' which would disentitle the husband to a divorce.

In yet another instance, on proven facts of adultery, the husband cannot claim that there was desertion by the wife, when in fact the wife was prepared to live with him. He cannot be permitted to take advantage of his own conduct and claim irretrievable breakdown of the marriage.³⁸

It is submitted that it means some matrimonial offence on part of the petitioner or some matrimonial wrongdoing which must be regarded as a grave and weighty matter or as something grave and convincing. Moreover, the mere fact that the petitioner also is not free from blame is not enough to invite the operation of the rule. It is of essence of the application of the rule that the 'wrong' or 'disability' must be of such a grave nature that to grant relief to the petitioner, notwithstanding the same, would be to permit the petitioner to take advantage of his or her own wrong.³⁹ Each case must depend on its own facts and circumstances and it is not possible to expect a comprehensive statement as to what may constitute 'wrong' within the ambit of the rule. In arriving at its conclusion, the court will certainly have regard to the intendment and scheme of the Act, which is to discourage divorce, but not withhold relief when the marriage has completely failed or broken down. When a spouse did not comply with a decree for restitution on the ground that he had filed a petition for divorce; it would not amount to taking advantage of one's own wrong.⁴⁰

The question of a petitioner taking advantage of his or her own wrong or disability, cannot arise where the petitioner is insane or suffering from mental disorder. This is made clear by the amendment in cl (a). Nor can any such question arise where divorce is sought on the ground of mutual consent of the parties as envisaged in s 13B.

Reference may be made to notes under 'Insincerity: Approbation' supra.

CONNIVANCE

Where the ground for relief is that adultery was committed by the respondent, it is the duty of the court to inquire, so far as it reasonably can, into the

³⁸ *Chetan Dass v Kamla Devi* AIR 2001 SC 1709.

³⁹ For instance, cases where demand made for extra dowry is not satisfied. Reference may be made to *Adarsh Parkash v Sarita* AIR 1987 Del 203.

⁴⁰ *Bal Kishan v Urmila* AIR 2001 Raj 404

matter and satisfy itself that the petitioner was not an accessory to the offence and that there was no connivance on his part of the act or acts complained of. Clause (b) of sub-s (1) lays down this rule.

Connivance is anticipatory willing consent or culpable passive acquiescence in a course of conduct reasonably likely to lead to the commission of adultery. To constitute connivance, active corruption is not necessary but corrupt intention is essential. Passive acquiescence with the intention and in the expectation that guilt will follow may suffice; but there must be the element of consent, express or implied. Mere inattention, negligence, folly, dullness of apprehension, or imprudence are not connivance. What is to be considered is the intention of the party and not his wisdom. Where there is active consent, the intention is impliedly corrupt and the defence is complete. However, where it has to be implied from certain acts or conduct, it must be shown to have proceeded from a corrupt motive. The doctrine rests on the principle of the ecclesiastical courts that the petitioner cannot take advantage of his own wrong and must 'come with clean hands' and has its source and its limitations in the maxim *volenti non fit injuria*. It is not necessary, however, to show that the spouse against whom connivance is alleged was an accessory before the fact. That is stated in the section as a separate matter for consideration.

It is of the essence of connivance that it precedes the event and, generally speaking, the material event is the inception of the adultery and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first.⁴¹

The expression 'passive acquiescence' used in the present context is apt to be misleading if the element of intention and consent is left out of account. A husband who, having reason to suspect that his wife commits adultery, seeks proof of it, and keeps a watch on her or employs an agent to do so, or so conducts himself that the wife gets an opportunity for its continuance is not guilty of connivance if he does nothing to encourage her in the commission of the offence.⁴² However, if the petitioner deliberately fosters and encourages situations to arise and knows that adultery is likely to result, he is guilty of connivance and it is no answer that the motive was to obtain conclusive proof.⁴³

In a case in England, a note of warning was given by Lord Merriman⁴⁴ which, it is submitted, must not go unheeded:

⁴¹ *Churchman v Churchman* [1945] 2 All ER 190, 194, [1945] P 44; *Mudge v Mudge* [1950] 1 All ER 607; *Richmond v Richmond* [1952] 1 All ER 838.

⁴² *Douglas v Douglas* [1950] 2 All ER 748, *Mudge v Mudge* [1950] 1 All ER 607, *Rumbelow v Rumbelow and Hadden* [1965] All ER 767 (husband 'wilfully blind' to wife's adultery).

⁴³ *Manning v Manning* [1950] 1 All ER 602.

⁴⁴ *Churchman v Churchman* [1945] 2 All ER 190, 195.

Much of the difficulty in dealing with the question of connivance arises from the fact that in the past, judges have gone beyond the facts of the particular case in an attempt to lay down general principles of wider application. In our opinion it is of the utmost importance to bear in mind that the issue is whether on the facts of the particular case, the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery; and that the court should not allow its judgment to be affected by importing, as a principle of universal application, pronouncements made with regard to wholly different circumstances, and so be led to a conclusion contrary to the justice of the case.

When it is said that connivance is an absolute bar, it does not mean that adultery with one person which has been connived at excludes all relief for all time in respect of subsequent adultery with another person. Once the court has found connivance, it must investigate all the circumstances, including the lapse of time between the adulteries, and then decide whether or not the connivance has spent its force before the subsequent adultery has been committed.⁴⁵

CONDONATION

Clause (b) of sub-s (1) in terms lays down the effect of the doctrine of condonation. It rules in substance that:

- (i) a petition for judicial separation or divorce on the ground of adultery specified in s 13(1)(i); or
- (ii) a petition founded on cruelty (s 13(1)(ia)),

shall be dismissed, unless the court is satisfied that the petitioner has not in any manner condoned the adultery or cruelty.

Adultery and cruelty are in terms stated in cl (b) of this section as condonable marital offences. Clause (b) is also explicit that condonation is an absolute bar to the granting of any relief in case of the offences under the relevant provisions. The court has no discretion in the matter and if it is satisfied that the petitioner has in any manner condoned the act or acts of adultery or the cruelty complained, the petition must be dismissed.

The Act does not define 'condonation.' Nor has any compendious definition touching all its aspects been judicially given. The generally accepted meaning is that it is forgiveness and reinstatement with knowledge of all material facts. It is regarded as forgiveness, express or implied, for a breach of a matrimonial offence with the implied condition that the offence will not be repeated. In respect of its operation, condonation is described as 'blotting

⁴⁵ *Gorst v Gorst* [1951] 2 All ER 965, 957.

out of the offence' so as to restore the offending spouse to the same position which he or she occupied before the offence was committed. The phrase 'blotting out of the offence' is not used in this context in its literal sense because an offence having been committed cannot actually be blotted out, and because it is recognised that condonation is always coupled with an implied condition on the offending spouse, being in future of good behaviour. Where there is no breach of this implied condition and no fraud in the matter, forgiveness stands as complete, absolute and irrevocable. Therefore, condonation consists of a *factum* of *reinstatement* and *animus remittendi*. It rests on the principle that in a case where status quo ante between the spouses has been restored, that which is forgiven must be regarded in the eye of the law as forgotten and obliterated; and since the result is obliteration of the condoned offence, it cannot be used for any purpose whatever (unless subsequently revived) and the condoned spouse becomes *rectus et integer*. This is the foundation of the doctrine of condonation.⁴⁶

Condonation has been the subject of many decisions and dicta in the courts in England. It has been emphasised that there are two elements in condonation, the first being forgiveness, and the second being reinstatement. The implications of condonation were authoritatively stated by Lord Simon LC in *Henderson v Henderson*:⁴⁷

Condonation involves forgiveness confirmed or made effective by reinstatement. The essence of the matter is—taking the case where it is the wife who has been guilty of matrimonial offence—that the husband with knowledge of the wife's offence should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. It is clearly established that this forgiveness is conditional—conditional on the condoned spouse thereafter fulfilling in all respects the obligations of marriage—so that, if any matrimonial offence is afterwards committed by him or her—whether or not the same as that condoned and whether or not in itself giving ground for divorce or judicial separation—the condonation ceases to have effect. The offence condoned and all its consequences are for all purposes revived. It is this characteristic of revival of the condoned offence which invited the observation that the expression forgiveness is misleading as an interpretation of condonation since it is only conditional and that the real import of condonation is 'a conditional waiver of the right of the injured spouse to take matrimonial proceedings'.⁴⁸

⁴⁶ *Chandrabhagabai v Rajaram* (1955) 57 Bom LR 946, 949, AIR 1956 Bom 91, 93

⁴⁷ [1944] AC 49, [1944] 1 All ER 44.

⁴⁸ *Cramp v Cramp* [1920] P 158; *Perry v Perry* [1952] 1 All ER 1076, 1080.

It will be seen that no description of condonation would give its true and full import without stressing its essential characteristic of reinstatement that postulates an intention to forgive and remit the wrong.

In the undermentioned case,⁴⁹ the Supreme Court examined the doctrine of condonation in some of its important aspects and inter alia observed:

Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore two things: forgiveness and restoration.... 'Evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty' though 'intercourse is not a necessary ingredient of condonation'.

Reinstatement of the offending spouse is a prime requirement of the doctrine and mere forgiveness of the matrimonial offence is not sufficient though of course, where there is satisfactory evidence of reinstatement after knowledge of the offence, it may not be difficult to conclude that the offence was or must be deemed to have been forgiven. There is a distinction between forgiveness and condonation, and the distinction lies in the fact that condonation implies a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation or intercourse.⁵⁰

An instructive illustration of condonation of the matrimonial offence of cruelty is furnished by the case of *Dastane v Dastane* decided by the Supreme Court, to which reference has already been made above and in the notes under s 13(1)(ia). On assessment of the evidence, the Supreme Court found that the acts and conduct of the respondent wife clearly amounted to cruelty, but the cruelty had been condoned by the appellant. It was held that the spouses had led a normal sexual life despite the respondent's acts of cruelty and the intent to forgive and restore the offending spouse to the original status could reasonably be inferred.

Condonation need not be express; it may be implied from the conduct of the parties and circumstances of the case. Though not a matter of an agreement in the strict sense, there must be an intention to forgive on the part of offended spouse and willingness to be forgiven by the other. It is not a unilateral matter. Reconciliation is the test of condonation.

⁴⁹ *Dastane v Dastane* AIR 1975 SC 1534, *Virupaxi v Saropni* AIR 1991 Kant 128 (petitioner condoning wife's adultery, no divorce on that ground), *Meera v Vijay* AIR 1994 Raj 33 (past acts alleged, not proved, deemed to have been condoned).

⁵⁰ *Emmanuel v Mandakini* AIR 1946 Nag 69, 71; *Ste Croix v Ste Croix* (1917) 44 Cal 1091, 1109, *Devadas v Gyanwale* AIR 1993 MP 14 (spouses living together for about eight months after allegations of cruelty—amounts to condonation).

'Forgiveness' must be understood not in any psychological or theological sense implying that no resentment at the wrong is any longer felt, but in the legal sense, as implying merely that the legal remedy is waived.⁵¹ Forgiveness must have the element of being mutual. There would be no condonation if the guilty spouse did not wish to be forgiven.⁵²

Though there is a presumption against condonation which is an affirmative defence, it is a defence favoured by the law.

KNOWLEDGE OF THE MATRIMONIAL OFFENCE

Condonation to be effective and binding must rest on reinstatement and *animus remittendi*. The intention to forgive and subsequent reinstatement must be with knowledge of the material facts of the antecedent guilt. It is sometimes said that condonation can take place only when the offended spouse has full knowledge of all the circumstances of the particular offence forgiven.⁵³ Mere suspicion of the offence would not invite the operation of the doctrine.⁵⁴ Belief in the fact that the offence had been committed followed by forgiveness and return to cohabitation may suffice even if there was no full knowledge of all the circumstances of the offence. However, mere belief in itself does not constitute knowledge.⁵⁵

CONTINUANCE OR RESUMPTION OF SEXUAL INTERCOURSE

The fact that the husband cohabited with the wife for some months even after knowledge that she had sexual intercourse with another person would be sufficient to constitute condonation.⁵⁶ It would be repugnant to decency and good sense to allow a husband to say that he had sexual intercourse with his wife and yet did not forgive her because he did not intend to remit the wrong done to him; he would be thereby approving and reprobating

51 *Rayden on Divorce*, 10th edn, note (a), p 284.

52 *Ganta Nagamani v Ganta Laxmanrao* AIR 1992 AP 76 (wife continuing illicit relationship—husband attempting reconciliation—would not amount to condonation); *Ford v Ford* [1970] 2 All ER 188.

53 *Ste Croix v Ste Croix* (1917) 44 Cal 1091; *Emmanual v Mandakini* AIR 1946 Nag 69; *Nirmala Devi v Ved Prakash* AIR 1993 MP 1 (in the facts held that cruelty had been condoned since the husband had filed proceedings for restitution of conjugal rights).

54 For a useful discussion on the question of 'knowledge' see *Burch v Burch* [1958] 1 All ER 848.

55 *Burch v Burch* *supra*.

56 *Chandra Mohini v Avinash* AIR 1967 SC 581; *Devendra Kumar v Chand Rani* AIR 1985 All 155 (finding of fact not disturbed in second appeal); *Lalit Mohan v Tripta Devi* AIR 1990 J&K 7 (mere resumption of cohabitation does not mean condonation of acts of cruelty).

the marriage. In England, the decision of the House of Lords in *Henderson v Henderson*⁵⁷ is conclusive on this point and there is no reason why the principle there stated should not be applicable in cases arising under the present enactment. It was said by Lord Simon LC in that case that where sexual intercourse had taken place, 'this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect'. The sole exception is in the case of fraud. Sexual intercourse, therefore, constitutes reinstatement of the wife even though the husband intended it only as a means of bringing about a reconciliation which was not affected. The principle, however, has not been applied in the reverse case of condonation by the wife and it has been held that an act of sexual intercourse is not conclusive proof that she has condoned her husband's matrimonial offence and that it does not raise an irrebuttable presumption that cohabitation has been resumed.⁵⁸ It may be asked why there should be this difference at a time when it is usually said that both the spouses should be placed on the same legal footing. The answer suggested are that circumstances may make it difficult for a wife to refuse sexual intercourse and her consent should not be regarded as an unequivocal act and secondly, that the husband should not be allowed to say that it is not conclusive evidence because of the extreme prejudice which the wife may suffer if she has a child as a result of it. The principle stated in an old case⁵⁹ in the ecclesiastical courts in England by Lord Stowell may be found useful in cases arising under the present enactment: 'The effect of cohabitation is justly held less stringent on the wife, she is more *sub potestate*, more *inops consilli*; she may entertain more hopes of recovery and reform of her husband'. In the House of Lords case referred to above it was pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations.⁶⁰

FORGIVENESS IS CONDITIONAL BUT CONDONATION IS NOT A CONTINGENT CONTRACT

Numerous decisions, contain language to the effect that forgiveness is conditional. The condition rather implied by law as the basis of it than

57 [1944] AC 49, [1944] 1 All ER 44; *Maslin v Maslin* [1952] 1 All ER 477; *Viney v Viney* [1951] 2 All ER 204; *Wells v Wells* [1954] 3 All ER 491.

58 *Mummery v Mummery* [1942] 1 All ER 553.

59 *Beeby v Beeby* (1799) 1 Hag Ec 789, *Rita v Brij Kishore* AIR 1984 Del 291 (on the facts and circumstances of a case, even continued cohabitation despite cruel treatment, may not amount to condonation); *Santana Banerjee v Sachindra Nath Banerjee* AIR 1990 Cal 367.

60 *Henderson v Henderson* [1944] AC 49, [1944] 1 All ER 44.

expressed in so many words is said to be that the forgiven spouse will not in future commit any 'matrimonial wrongdoing' or any 'matrimonial misconduct' or any 'matrimonial offence' or 'a breach of the marriage vows'. In an oft-quoted passage⁶¹ the matter has been put thus:

The plain reason and the good sense of the implied condition is that 'you shall not only abstain from... (the offence in question), but shall in future treat me—in every respect treat me—with conjugal kindness—on this condition I will overlook the past injuries you have done me.

It would seem that the more illuminating statement is that of Lord Simon:⁶²

...[C]onditional on the condoned spouse thereafter fulfilling in all respects the obligations of marriage.

This has considerable bearing on the question of revival of the matrimonial offence. (See 'Revival of the matrimonial offence' *infra*.)

Condonation, however, is not a contract or a contingent contract. It is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife's deliberately misrepresenting her true state of mind.⁶³

REVIVAL OF MATRIMONIAL OFFENCE

Reinstatement of the guilty spouse which postulates an intention to forgive and remit the wrong being conditional, the necessary legal implication is that if any matrimonial offence is afterwards committed the condonation ceases to have effect, or, as it is sometimes said, is cancelled and the offence condoned and all its consequences are for all purposes revived. The condition involved in reinstatement is not that the same matrimonial offence will not be committed in future but, as already pointed out, that the condoned spouse will in future fulfil in all respects the obligations of marriage.⁶⁴ It is not necessary that the subsequent offence should be *ejusdem generis* as the original offence. The phrase 'matrimonial offence' used in this context in

⁶¹ *Durant v Durant* (1824–34) All ER Rep 459.

⁶² *Henderson v Henderson* *supra*.

⁶³ *Henderson v Henderson* case.

⁶⁴ *Henderson* *supra*; *Premchand v Bai Galal* (1927) 29 Bom LR 1336.

relation to the future conduct of the condoned spouse is not to be understood as a statutory expression but merely as one used compendiously to include any violation of the obligations of marriage though mostly the future acts complained of are of the nature of adultery, cruelty or desertion. It is not necessary, therefore, that this subsequent matrimonial offence need be such as would, by itself, give adequate ground for divorce or judicial separation. Thus for instance, where the condoned offence was adultery it will not be incumbent on the forgiving spouse to establish an act or acts of adultery but proof of gross misconduct falling short of adultery will suffice;⁶⁵ and commission by the condoned spouse of the matrimonial offence less than legal cruelty will be sufficient if the conduct complained of is such as, if persisted in, will make married life together impossible.⁶⁶ The subsequent conduct of the parties after condonation may be indicative of revival, and plea by one of the spouses that prior instances of discord be ignored, may not be tenable.⁶⁷ Wilful neglect in providing reasonable maintenance for a wife can revive condoned cruelty.⁶⁸ There is language to the effect that even slight acts of matrimonial wrongdoing by the condoned spouse may be sufficient to revive the condoned offence and that the more serious the original offence the less grave need be the subsequent matters. These statements are, of course, unexceptionable but they must be understood in their proper context and as giving no more than a comparative idea of the matter. A good deal less may be sufficient, but the matter must be approached with great care and caution. In case, for instance, of condoned cruelty of a serious nature, when the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties, and a person who goes back to live with his or her spouse goes back on the implied condition alone. It can hardly be said that there should be a repetition of the whole course of ill-treatment or that there should be even the same kind or degree of ill-treatment. The homely metaphor that the camel needs protection from the last straw which is to break its back or even from the penultimate straw which threatens to do so has not remained judicially unnoticed and may perhaps serve to explain the principle. The test would be: Are the various acts of subsequent breaches of conjugal kindness such as to make life between husband and wife impossible or tend to make it impossible? If the marriage breaks down afresh by reason of the subsequent conduct of the

65 *Kemp v Kemp* [1953] 2 All ER 553; *Moreno v Moreno* (1920) 47 Cal 1068; *Cundy v Cundy* [1956] 1 All ER 245

66 *Richardson v Richardson* [1949] 2 All ER 380 (CA); *Thompson v Thompson* (1912) 39 Cal 395

67 *Abha Agarwal v Sunil Agarwal* AIR 2000 All 377 (revival after withdrawal of earlier proceedings)

68 *Dunn v Dunn* [1962] 3 All ER 587.

guilty spouse without any fault of the other innocent party, the latter is entitled to rely on the original guilty act as a ground for relief.

The rule that condonation is conditional and that therefore, if any matrimonial offence is committed after condonation, there is a revival of that which was condoned, does not mean that the condonation remains conditional for all time to come. It is true that the guilty party is, so to speak, taken back on probation. The probationary period does not, however, necessarily last for life, and a point may be reached, where, by his or her good behaviour, the guilty party may become worthy of the trust and confidence of the other. The further that past offences recede into the distance, so much the more does it become difficult to revive them, and the time may come when the proper inference is that the forgiveness is not longer conditional but has become absolute.⁶⁹ Thus for instance if adultery has been condoned say for seven years, a wife may not be entitled to say that it is revived because the husband has on one occasion, slapped her face.⁷⁰ Applying the same principle, it was held that where certain incidents alleged to have taken place amounted to acts of cruelty but the parties had thereafter lived a normal married life for some years, subsequent act alleged to amount to cruelty would not have the effect of reviving previous cruelty.⁷¹

CONDONATION IN CASE OF GROUNDS OF OFFENCES OTHER THAN ADULTERY OR CRUELTY

It is true that there is no reference in cl (b) of sub-s (1) to condonation as regards a petition by the wife on the ground that her husband has been guilty of rape, sodomy or bestiality (s 13(2) (ii)) but in those cases, condonation may be made applicable by analogy.⁷² Even if no such analogy is permissible there would not be much difficulty because if a wife were to petition for divorce on any of these grounds after forgiving the guilty husband the factor of delay would mostly be present and disentitle her from getting relief. The doctrine of condonation, as already pointed out, is inappropriate and inapplicable to the offence of desertion. Nor would it be appropriate to apply the doctrine to the case of a wife who has continued to live with the husband, for instance, in the hope that the husband's disability may disappear.

STANDARD OF PROOF

This clause required that the court should be 'satisfied' that the petitioner has not condoned the act or acts complained of before relief can be given

69 *Beale v Beale* [1950] 2 All ER 539–40.

70 *Richardson v Richardson* [1949] 2 All ER 330, 332.

71 *Beale v Beale* [1950] 2 All ER 539–40.

72 *Perry v Perry* [1952] 1 All ER 1076, 1082.

in cases covered by it. In England it has been held by the House of Lords in *Blyth v Blyth*⁷³ that it is not incumbent that condonation should be established beyond reasonable doubt and that so far as bars to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability, he did not connive or condone. It is submitted that under the present section though the standard is the same for all matters, there is nothing in the decisions of the Supreme Court relating to standard of proof in case of matrimonial offences which can be said to militate against acceptance of the above view in respect of bars like connivance or condonation.

COLLUSION

Clause (c) of sub-s (1) lays down that the court shall pass a decree in any proceedings under the Act only if it is satisfied inter alia that the petition is not presented or prosecuted in collusion with the respondent. If the initiation of any proceeding under the Act is procured, or its conduct (especially if abstention from defence be a term) provided for by agreement between the parties, or their agents, that constitutes collusion.⁷⁴ Collusion may consist in an understanding, express or implied, that the court shall be deceived by misrepresentation, exaggeration or suppression of facts. There must be present an element of corruption or perversion of justice.

It is the duty of the court to inquire, so far as it reasonably can, into the matter and satisfy itself that there is no collusion between the parties. If there is reason to suspect collusion between the parties, the court will examine the matter with anxious care because collusive bargains affecting matrimonial causes tend to pervert the course of justice and seek to prevent the court from retaining control in such matters which it is its duty to exercise.

There is a resumption of innocence, which, however, may be counterbalanced by circumstances which lead to suspicion. In such a case, the party who is seeking relief from the court must discharge the legal burden of negating collusion and satisfy the court that there has been no collusion between the parties or their agents.⁷⁵ As to standard of proof in the matter of collusion, reference may be made to notes under 'Standard of Proof' in the matter of condonation *supra*.

A decree obtained by parties by collusion would not be set aside on an application by either party for that would be to allow a party to take advantage of his or her own wrong.⁷⁶

⁷³ [1966] 1 All ER 524.

⁷⁴ *Churchward v Churchward and Holliday* [1895] P 7; *Ste Croix v Ste Croix* (1917) 14 Cal 1091.

⁷⁵ *Lowndes v Lowndes* [1950] 1 All ER 999, 1003-04.

⁷⁶ *Nirmala v Narasimha* (1973) ILR Kant 584.

The parties, often quite reasonably, in anticipation of a divorce make arrangements in respect of such matters as joint property or household; the maintenance of the wife; the custody of the children and sometimes, as to costs. Such arrangements are not collusive so long as they do not tend to pervert the course of justice. They often have to be made as a matter of necessity. They only amount to collusion if one party or the other uses them as a bribe—for instance, if a husband promises excessive maintenance as a bribe to persuade his wife to bring divorce proceedings or, if he promises to let the wife have the custody of the children to induce her to abstain from defending herself. Parties may even compromise a claim for damages in divorce proceedings so long as the agreement does not tend to prevent the course of justice and it is brought to the notice of the court and sanctioned by the court. The reason why these matters have to be brought before the court is that the judge can inquire whether there is collusion or not. Unless sanctioned by the court, such arrangements are invalid. It is, therefore, the duty of the parties and their professional advisers to bring such facts to the notice of the court.⁷⁷

DELAY

Clause (d) lays down unnecessary or improper delay in instituting a proceeding as one of the absolute bars to the granting of any relief under the Act. The scheme and framework of the present act on the question of desertion of the court in the matter of granting or withholding relief is, as already pointed out, different from that of other analogous legislation. Unreasonable delay in presenting or prosecuting a petition for divorce or judicial separation is not an absolute but a discretionary bar under English law and the Indian Divorce Act 1869, and it will be necessary to bear that in mind in determining cases which fall for consideration under the present clause when reference is made to decisions under such analogous law. An examination of cases decided under the English law and the Indian Divorce Act 1869, under the head 'Discretion' will show that they were founded on considerations which are not now particularly emphasised in England and it will be noticed that the more modern trend is to exercise a liberal discretion in many instances when formerly a decree would have been refused on the ground of unreasonable delay. An authoritative statement on the subject of discretion was given by Lord Simon LC in the leading case of *Blunt v Blunt*⁷⁸ where the chief considerations which ought to weigh in helping the court to arrive at a just conclusion were indicated. It was also observed in that case that one consideration of a general character which must be regarded as of primary importance in the matter of the operation of

⁷⁷ *Teale v Burt* [1951] 2 All ER 433–34.

⁷⁸ [1943] AC 517, [1943] 2 All ER 76.

discretionary bars was the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It was also observed that in recent years this consideration had operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused. Applying the principles enunciated in the above case, courts in England have in recent decisions condoned what was admittedly, culpable delay and, granted decrees for divorce.⁷⁹

The expression 'unnecessary or improper delay' it is submitted, connotes culpable delay. In England, it has been held that the expression 'unreasonable delay' used in the Matrimonial Causes Act 1950, in s 4(2), proviso (i), envisages culpable delay.⁸⁰ Though the court under the present section has no discretion in the matter and is bound to refuse relief where there is unnecessary or improper delay in instituting proceeding and is not empowered to condone the same it would seem that the absolute bar would be permitted to operate only in extreme cases. Consideration of the application of the bar of delay may arise in a variety of cases and it would be impossible to expect rules that may be of assistance in all cases.⁸¹ Nor does it seem possible to list cases in which delay would be regarded as falling short of the rule that bars relief where it is unnecessary or improper. Delay resulting from ignorance of law has under analogous law been sometimes accepted as not unreasonable. Delay caused by the petitioner's want of means and the poverty of the petitioner would not be regarded as unnecessary or improper delay.⁸² Unwillingness to involve members of the petitioner's family in family difficulties; regard for their feelings;⁸³ consideration

79 *Purton v Purton and George* [1956] 3 All ER 952; *Key v Key* [1956] 3 All ER 955. Reference may also be made to *Becker v Becker* [1966] 1 All ER 894 per Lord Denning.

80 *Key v Key* [1956] 3 All ER 955-56.

81 *S v R* AIR 1958 Del 79 (a delay of six years after the parties began to live separately was held satisfactorily explained); *Leela v RA Singh* AIR 1963 Raj 178; *A v B* AIR 1967 Punj 152 (pre-Act marriages); *Nirmoo v Nikka Ram* AIR 1968 Del 260 (11 years: pre-Act marriage); *Lalithamma v Kannan* AIR 1966 Mys 178 (pre-Act marriage); *Nijhawan v Nijhawan* AIR 1973 Del 200; *Atmaram v Narbada Devi* AIR 1980 Raj 35. See Notes under s 13(2); *Akkamma v Jagannadham* AIR 1981 AP where though there was delay of 10 years the court granted relief as it was satisfied that the parties had 'buried the marriage long ago' and that the marriage had broken down irretrievably; *Kaushalya Devi v Masti Ram* AIR 1981 HP 63; *Rukhmini v Srinivasa* AIR 1984 Kant 131 (eight years).

82 *Moreno v Moreno* (1920) 47 Cal 1068; *Key v Key* [1956] 3 All ER 955; *Becker v Becker* [1966] All ER 894.

83 *S v R* AIR 1968 Del 79; *Jyotish Chandra v Meera Guba* AIR 1970 Cal 266 (avoidance of scandal).

of the honour and prestige of the family; fear of scandal and desire to avoid a final break-up if possible; reasonable hope of reconciliation are some of the factors which have been taken into consideration by courts when they are relied upon for the purpose of showing that delay was not necessary or improper. Patience and forbearance on the part of a spouse and particularly, the wife and consideration of welfare and position and interest of children of the marriage may warrant putting off legal action for redress and the court would in any such case be extremely slow in holding that there was unnecessary or improper delay in instituting the proceeding. Absence of a showing of disadvantage to the respondent can also be a factor that may weigh with the court.

Where the ground of the petition for judicial separation or divorce is adultery, and there is an issue as to unnecessary or improper delay or where it appears to the court that there has been undue delay in instituting the proceeding, there are two questions in such case which first require to be considered, namely, when did the petitioner first know or had reason to believe that the respondent had committed adultery? And when did the petitioner first take action in order to obtain the relief? A further question to be considered is whether there is some reasonable explanation for the delay and if there is some explanation that is satisfactory the delay cannot be said to be unnecessary or improper.⁸⁴

Inordinate and unexplained delay in applying for restitution of conjugal rights can result in dismissal of the application.⁸⁵ So also would inappropriate and unexplained delay be a bar to an application for judicial separation on grounds of desertion or cruelty.⁸⁶ Similarly, in case of an application for dissolution of marriage (after decree for the restitution of conjugal rights) falling under s 13(1A)(ii), such delay would deprive a spouse from getting relief.⁸⁷

The principle and the basis of the rule is that delay is a material factor because if unexplained, it may lead to the inference that there was collusion between the parties, or acquiescence in the injury or indifference to the same or some wrong motive for seeking relief after slumbering over the matter in sufficient comfort for an inordinate period after the ground for relief had arisen. Whether the delay in instituting proceeding is unnecessary or improper, would depend on the facts and circumstances of each case. There is no magic in any particular period. A petitioner may not readily be

⁸⁴ *Thimmappa v Thimmavva* AIR 1972 Mys 234–36 (court has expressed agreement with the above); *Virupaxi v Sarojini* AIR 1991 Kant 128 (petition on ground of adultery, presented after eight years, such delay is fatal).

⁸⁵ *Shanti Devi v Ramesh Chandra* AIR 1969 Pat 27.

⁸⁶ *Mobinder Pal v Kulwant Kaur* AIR 1976 Del 141 (21 years).

⁸⁷ *Jasmal Singh v Gurnam Kaur* AIR 1975 P&H 225 (about eight years: no satisfactory explanation).

charged with improper or unnecessary delay where any element of the nature indicated above is shown to have existed.

At the same time, the court will not permit itself to be used as a place to which a party to a marriage can come for redress whenever it suits him or her to do so, having in the meantime, held the weapon of redress over the head of the other party to the marriage. Delay in such a case would be highly improper.⁸⁸

DELAY AND PROCEEDING ON GROUND OF DESERTION

Different considerations may apply in dealing with the question of unreasonable delay in cases of desertion than in cases of adultery or cruelty. The fact that a person does not, immediately after the period mentioned in the section take proceedings for divorce is not of itself a matter calling for criticism at all. Regarded from the opposite point of view, it would be in many cases, and perhaps in most cases, a praiseworthy attitude. In many cases, spouses endure the situation with patience before seeking relief available to them. If, however, the delay was for a number of years and completely unexplained, the position may be different. Even in such a case, opportunity should be given to explain such delay.⁸⁹

DELAY AND PROCEEDING FOR NULLITY ON GROUNDS OF IMPOTENCE

In England it is a well-settled law that delay in bringing a suit for nullity on the ground of impotence is not, apart from a statutory provision to the contrary, in itself a bar, though it throws a special burden of proof upon the petitioner. Under the present section, delay, if shown to the satisfaction of the court to be unnecessary or improper, in instituting any proceeding under the Act, which obviously included proceeding for nullity of marriage under s 12(1)(a), would be a bar to the relief. The case law on the subject was examined in the undermentioned case and it was rightly observed that it is not so much the time factor between marriage and the proceedings in any such case that matters, as the conduct of the parties during the period and the explanation given for that conduct.⁹⁰

88 *Llewellyn v Llewellyn* [1955] 2 All ER 110. For an instance of 'unnecessary or improper delay' see *Teja Singh v Sarjit Kaur* AIR 1962 Punj 195; *Dharam Dev v Raj Rani* AIR 1985 Del 389 (16 years).

89 The observations of Lord Denning made with his usual felicity in *Becker v Becker* [1966] 1 All ER Rep 894 will be found instructive. *Rukmini v Sannurasa* AIR 1972 Kant 131; *Gulmet Singh v Bharpur Kaur* AIR 1985 P&H 147.

90 *Vinod Chandra v Aruna* AIR 1977 Del 24.

CLAUSE (E)...LEGAL GROUND WHY RELIEF SHOULD NOT BE GRANTED

The legal grounds contemplated by this clause and which operate as bar to any relief under the Act are grounds stated in the various provisions of the Act itself. A ground for relief cannot be said to exist or to have been established if the requirements of the ground and the conditions relating to the same are not fulfilled and presumably, the clause was inserted *ex abundanti cautela*. Thus for instance, where in case of a ground for relief a period of time is prescribed in the Act within which a petition founded on such ground should be presented,⁹¹ the court has no power to entertain such petition after the expiry of the period. In such cases, the court has no discretion in the matter and the petition must be dismissed. Similarly the court has no power to decree relief on any ground under the Act where any mandatory requirement of the Act which affects the grounds itself is not satisfied.

SUB-SECTION (2): RECONCILIATION

This sub-section casts on the court the duty, in the first instance, in a matrimonial cause (other than those cases covered by the amending proviso), where it may appear that there may be some chance of saving the marriage, to make every endeavour to bring about a reconciliation between the parties. This sub-section must be read with sub-s (4). Both are reconciliation provisions and give inter alia, conciliation procedure. Any attempt of this nature is always laudable and it is incumbent on the court to take such steps in the matter as may seem prudent having regard to the nature and circumstances of the case. The court is expected to make 'every endeavour' to bring about a reconciliation.⁹² Failure on the part of the trial court to make any such attempt would be a serious omission but it cannot affect the jurisdiction of the court or render the decree invalid. In the undermentioned cases the High Court remanded the matter on the ground that this sub-section had been overlooked by the trial court.⁹³ Even if the trial court does not make an attempt at reconciliation, such a defect can be cured by the appellate court.⁹⁴

⁹¹ See ss 12(2)(a)(i), (b)(ii).

⁹² Even if the advocates for the parties inform the court that there is no chance of any reconciliation: *Chhote Lal v Kamla Devi* AIR 1967 Pat 269; *Raghunath Prasad v Urmila* AIR 1973 All 203; *Manju Singh v Ajay Bir Singh* AIR 1986 Del 420; *Sushma Kumari v Om Prakash* AIR 1993 Pat 156; *Vimlesh v Prakash Chand Sharma* AIR 1992 All 260.

⁹³ *Anupama v Bhagaban* AIR 1972 Ori 163; *Raj Rani v Harbans Singh* AIR 1972 Pat 392; *Sakri v Chhanwarlal* AIR 1975 Raj 134; *Leelawati v Ram Sewak* AIR 1979 All 285; *Thanikodi v Ramirthayee* AIR 1986 Mad 263 (decree would not be illegal).

⁹⁴ *Sushma Kumari v Om Prakash* AIR 1993 Pat 156.

It would be competent to, and indeed desirable on the part of the appellate court as also the court hearing a second appeal, if reasonably possible, to make an endeavour to bring about a reconciliation between the parties.⁹⁵ In the undermentioned case,⁹⁶ the Supreme Court gave appropriate directions to bring about a rapprochement between the parties.

The words 'before proceeding to grant any relief which the Act' do not cover the summary proceeding under s 24 which only deals with maintenance *pendente lite* and expenses of the proceeding.⁹⁷

PROVISO

The proviso exempts operation of the requirement laid down in sub-s (2) in the specified cases. Clauses (ii)–(vii) of s 13(1) are grounds for divorce in relation to which it would be hardly appropriate to speak of bringing about any reconciliation between the spouses.

SUB-SECTION (3)

This sub-section gives a rule which is a part of conciliation procedure.

The English Matrimonial Causes Act 1973, contains similar provisions. The obvious object of the present sub-section is to explore avenues of reconciliation between spouses engaged in matrimonial litigation under the Act if that can be done through mediation of a third party. In the present context, it has been observed in the undermentioned case that Parliament has 'shown its concern that the possibility of reconciliation between spouses who...are engaging in matrimonial litigation should be explored, in order to ascertain whether this might not be more conducive to the happiness of the spouses and their children than the forensic prosecution of their dispute. Experience has shown that reconciliation is more likely to be achieved and would be permanent if...help is made available to the parties with this object. Moreover, even if complete reconciliation cannot be achieved...help will often enable the parties to resolve, with the minimum possible anxiety and harm to themselves or their children, many of the issues liable to be ancillary to the breakdown of a marriage. Short of this, it should at least identify the issues on which the parties remain seriously at variance and on which in consequence they require adjudication of the court'.⁹⁸

⁹⁵ *Jurubai v Nimgappa* AIR 1963 Mys 3; *Raj Rani v Harbans Singh* AIR 1972 Pat 392; *Trilok Singh v Savitri Devi* AIR 1972 All 52.

⁹⁶ *Annapurna v Sukumar* (1981) Suppl SCC 71 (highly commendable efforts made); *Dharmendra Kumar v Pushpa Devi* AIR 1995 MP 210 (order cannot be rendered illegal for want of efforts of reconciliation).

⁹⁷ *Dilipbhai v State of Maharashtra* AIR 1983 Bom 128.

⁹⁸ Practice Direction (1971) 1 All ER Rep 894.

It is common knowledge that mediation of the nature envisaged in sub-s (3) could at times prove quite successful.

This sub-section envisages that a referee or an arbitrator can be appointed by the court in order to try and bring about a reconciliation, but it would be outside the purview of the arbitrator's powers to recommend a dissolution. The arbitrator only enjoys a limited role, that of a conciliator, he cannot decree a dissolution.⁹⁹

23A. Relief for respondent in divorce and other proceedings.—In any proceeding for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the ground of petitioner's adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground; and if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

This section was added by the Amending Act of 1976. Where a proceeding is initiated by a party on the ground of adultery, cruelty or desertion, the respondent may not only oppose the relief sought but may also make counter-claim for any relief under the Act on that ground without any separate or cross-petition. For instance, see the undermentioned case.¹

A claim for alimony by the wife for herself and her child in an application by the husband for restitution of conjugal rights is a counterclaim within the ambit of this section.² A wife can resist a petition for restitution of conjugal rights on the ground that the husband was guilty of desertion without lodging a counterclaim for any relief.³ The court may not permit a counterclaim to be made for the first time in appeal.⁴

A counter claim under the provisions of O 8 r 6A of the Code of Civil Procedure 1908 is not maintainable in view of the provisions of this section, under which a counter claim could be made.⁵

99 *Rajkumar v Anjana Kumari* AIR 1995 P&H 18.

1 *Srikant v Anuradha* AIR 1980 Kant 8; *Surajmal v Rukminibai* AIR 2000 MP 48.

2 *Somaiah v Padma* AIR 1983 Kant 114.

3 *Satyanarayana v Veeramani* AIR 1981 AP 123; *Sandhya v Gopinath* AIR 1983 Cal 161.

4 *Sandhya v Gopinath* AIR 1983 Cal 161.

5 *Sameeran Roy v Leena* AIR 2001 MP 192.

24. Maintenance pendente lite and expenses of proceedings.—Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly, during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

MAINTENANCE PENDENTE LITE

The right of a wife for maintenance is an incident of the status or estate of matrimony. In general, therefore, the husband is bound to defray the wife's costs of any proceeding under the Act and to provide for her maintenance and support pending the disposal of such proceeding. The doctrine of alimony, which expression in this strict sense means allowance due to wife from husband or separation from certain causes, has its basis in social conditions in England under which a married woman was economically dependent and almost in a position of tutelage to the husband and was intended to secure justice to her, while prosecuting or defending proceedings under matrimonial law. It is also recognised that when the wife has separate means sufficient for her defence and subsistence, she should not be entitled to alimony nor costs during the proceeding; and if the husband has neither property nor earning capacity, the court would not award any interim alimony. It is on these principles that the law relating to matrimonial causes provides for rules for payment of maintenance pendente lite and expenses of proceedings by the husband to the wife. This section adopts those principles and goes one radical step further when it prescribes that any such order can be made not only in favour of the wife but also in favour of the husband.⁶ The expressions 'respondent' and 'petitioner' in the section obviously refer to the respondent and petitioner to the interlocutory application for alimony pendente lite and for provision for costs, and not to the petitioner and respondent to the substantive petition. There is no scope for doubt that the application under the section can be made by a spouse who may be the petitioner or the respondent to the substantive proceeding for any of the reliefs under the Act. Nevertheless, a contrary contention seems to have been raised in some cases and discountenanced.⁷

⁶ Reference may be made to the notes at p 193 *infra*.

⁷ *Kamla Smedhi v Shama Smedhi* (1958) 60 Bom LR 633; *Rameshwar Nath v Kavita Devi* AIR 1957 Punj 85; *Nanjappa v Vimal Devi* AIR 1957 Mys 41; *Gopendra Nath v Pratiba Rani* AIR 1962 Cal 455; *Rajkumari v Trilob Singh* AIR 1959 All 628; *Baburao v Sushila* AIR 1964 MP 73.

The amplest discretion is conferred on the court and an order for maintenance pendente lite and costs of the proceeding, as the initial words of the section, clearly state, can be made in any proceeding under the Act.⁸ Ofcourse, the order can be made while the proceeding is pending and not after its termination. Nor can any such order inure after the proceeding has ended. The availability of free legal aid will not disentitle the spouse from claiming litigation expenses.⁹

The section is explicit that the making of the order is a matter of discretion with the court and rules that the court may make the order in favour of the wife or the husband as the case may be, where it is shown that such spouse has no independent income sufficient for her or his support and the necessary expenses of the proceeding. The section also prescribes that the amount of interim maintenance that one spouse may be ordered to pay to the other must be such as appears reasonable to the court in the exercise of that discretion and directs the court that in doing so it must have regard to the petitioner's own income and the income of the respondent. The court is empowered under this section to make an order which is to operate during the proceeding—pendente lite—and where the matter is carried in appeal, only the appellate court would have power to make any interim order for maintenance pending the disposal of the appeal.¹⁰

Any decision under the present section on the subject of alimony must necessarily depend on the circumstances of each case and no fixed rules can be expected on the question. In case of ordinary or small incomes, a rough working rule adopted by some courts in India under some analogous legislation is to assess the amount at one-third of the aggregate income of the husband and wife, less the wife's income. It is submitted that in cases, falling for determination under this section, there can be no datum line but this rough working rule may be of some use in fixing the amount of interim maintenance in proceedings under the Act. Certain general observations of Lord Denning in the undermentioned case¹¹ on this 'one-third' rule will be found instructive. In case of very large income, the court would not have regard to any notional rule in exercising its discretion in the matter and the proportion may be less. It is essential to note that there can be no rigid rule in maintenance as to the proportion to be given and it would be an error

8 *Chitra v Dhruba Jyoti* AIR 1988 Cal 98 (injunction restraining husband from marrying during pendency of appeal). As to the form and contents of any application under the section, see the Rules framed by the various High Courts; *Ganesan v Rasammal* AIR 1994 Mad 366 (maintenance during the pendency of proceedings can be awarded).

9 *Pramesh Babu v Usha* AIR 2003 Mad 281.

10 In England, it has been held that the Court of Appeal has no power to make an order for interim payment pending appeal, but that is on a different ground: *Cavendish-Bentinck v Cavendish-Bentinck* [1948] 2 All ER 285; *Dipti Ghosh v Swapan Kumar Ghosh* AIR 1991 Cal 414 (appeal against *ex parte* order of alimony—appellate court can grant maintenance on application).

11 *Wachtel v Wachtel* [1973] 1 All ER 829.

to decide first what the proportion should be and then to examine the other relevant factors. The court will take all the circumstances of the case into account and arrive at a proper solution having particular regard to the factors which are mentioned in the section. Reference may be made to notes under s 25 'Assessment of Quantum...' It cannot be said that the liability under the section is kept very vague and therefore, the section is violative of the equality clause in art 14 of the Constitution.¹²

The use of the word 'support' in the section implies maintenance as the words are synonymous.¹³ Reimbursement of medical expenses would be a part of the support contemplated in the section.¹⁴ Reference is invited to the use of the word 'maintenance' in s 3 of the Hindu Adoption and Maintenance Act 1956, which would make it amply evident that both words are used to convey a similar meaning.

DENIAL OF MARRIAGE

The mere fact that the respondent denies the factum of marriage is no bar to the power of the court to make an order under this section. Ofcourse, a good prima facie case about the marriage would have to be made out by the petitioner before any such order would be made by the court in case of any such contention being raised by the respondent.¹⁵ The provisions of this section should not be constricted and a narrow interpretation should not be made. The section has been made applicable so as not to convey the strict and literal meaning as to convey only legally married wife and husband.¹⁶

DENIAL OF JURISDICTION

An order for interim maintenance or costs under this section can be made, even if objection to jurisdiction of the court is raised and not decided, provided that the court is satisfied prima facie that it has jurisdiction to entertain the substantive petition.¹⁷

DEFENCES TO SUIT AND JURISDICTION

The jurisdiction of the court is not controlled by the defences raised by the respondent in the substantive matter. It is only circumscribed by the condition

¹² *PS Krishnamurthy v PS Umadevi* AIR 1987 AP 237.

¹³ *Pradeep Kumar v Shilaja* AIR 1989 Del 10.

¹⁴ *R Suresh v Chandra* AIR 2003 Kant 183, *Romant Menon v KG Omnakuttan* AIR 2004 Guj 23 (maintenance includes education expenses)

¹⁵ *Jain v Jain* AIR 1968 Cal 405.

¹⁶ *Laxmibai v Ayodhya Prasad* AIR 1991 MP 47.

¹⁷ *Surendra Kumar v Kamlesh* AIR 1974 All 110, *Ronalds v Ronalds* (1975) 1R 3 P&D 259, *Smith v Smith* [1923] P 128 (costs), *Ranjit Rai v Chitralekha* (1973) Del LJ 363.

laid down in the section itself as regards the sufficiency or otherwise of the income of the petitioner.¹⁸

PRACTICE

The trial court should not postpone its decision on the application for interim maintenance and costs till disposal of the main issue in the substantive matter.¹⁹ The court should not pass any decree without deciding any application for maintenance under this section that may be pending before the court.²⁰

Proceedings under this section have been held as contemplating a summary inquiry which includes going into the merits of the case.²¹

HINDU ADOPTIONS AND MAINTENANCE ACT 1956

Section 18 of the Hindu Adoption and Maintenance Act lays down the rule relating to the personal legal obligation of a husband to maintain his wife. The mere fact that a wife has adopted proceedings under that section is no bar to her claiming any relief under this Act and also claiming interim maintenance under the present section. The very object and purpose of the present section is to provide immediate relief to her in any proceeding adopted by her under this Act. The position would be the same if the proceeding under this section had been started by the husband.²² Proceedings under this section are in no way inconsistent with provisions of s 18 of the Hindu Adoptions and Maintenance Act and are not hit by s 4(b) of that Act.²³ Maintenance would include educational expenses under the Hindu Adoptions and Maintenance Act 1956. The remedy however, is to claim such expenses under the said Act.²⁴

CRIMINAL PROCEDURE CODE

The mere fact that there is a pre-existing order for maintenance against the husband under the Criminal Procedure Code would not bar the court from making an order under this section in the exercise of its discretion.²⁵ Nor will

18 *Arti Singh v Kunwar Pal Singh* AIR 1977 Del 76; *Gangu v Pundlik* AIR 1979 Bom 264 (does not depend on merits of case); *Ram Kumar v Nirmala Devi* (1978) 80 Punj LR 561 (wife denying factum of marriage cannot claim maintenance but may be granted expenses); *Bijal Dave v Parag* AIR 1999 Bom 239 (misconduct not to be gone into at the stage of s 24 application).

19 *Supra*.

20 *Meena Deshpande v Prakash Deshpande* AIR 1983 Bom 409.

21 *Laxmibai v Ayodhya Prasad* AIR 1991 MP 47.

22 *Simbachalam v Papasamma* AIR 1973 AP 31 (claim made by wife in proceedings for restitution of conjugal rights by the husband); *Neelam Malhotra v Rajinder* AIR 1994 Del 234.

23 *Vinod v Usha* AIR 1993 Bom 160.

24 *Ravee Saharawat v Ujjawal Sahrawat* AIR 2002 P&H 288.

25 *Surjit Kaur v Tirath Singh* AIR 1978 P&H 112.

the mere fact that the wife was denied maintenance in proceedings under s 125 of the Criminal Procedure Code.²⁶ The amount awarded under s 125 of the code is adjustable against the amount awarded in proceedings under this section.²⁷

An order of interim maintenance under the present section is not a final determination and though entitled to consideration in a proceeding for maintenance under the Criminal Procedure Code 1974 (s 125), it does not restrict the power or discretion of the magistrate in the matter of quantum of maintenance in a proceeding under the Code. It would be more so where in the proceeding under the Code, maintenance is claimed also for children of the marriage.²⁸

MATTER ORDINARILY DECIDED ON AFFIDAVITS

Application for interim maintenance is as a general rule and practice, disposed of on affidavits like any other interim application in civil proceedings,²⁹ unless the court finds that the matter cannot be so disposed of properly. Then only the court would proceed to record evidence before deciding the matter.

‘... IN ANY PROCEEDING UNDER THIS ACT’

An order for maintenance pendente lite and costs of the proceedings can, as the initial words of the section clearly state, be made in any proceeding under the Act, namely for restitution of conjugal rights, judicial separation, divorce or nullity of void and voidable marriage. When the fact of marriage is acknowledged or proved alimony follows subject of course to the discretion of the court in the matter having regard to the means of the parties, and it would be no answer to the claim for maintenance pendente lite that the marriage was void *ipso jure* or was voidable. The court regards it as prudent to adhere to the principle that a marriage de facto carries the right to alimony pendente lite. There is no distinction in a claim of maintenance dependent upon the proceedings being either under s 12 or 13.³⁰

The subsequent dismissal of the substantive petition does not exonerate a party from the liability already incurred under an order made under this section.³¹

26 *Prem Nath v Prem Lata* AIR 1988 Del 50.

27 *Sudeep Chaudhary v Radha Chaudhary* AIR 1999 SC 536.

28 *Ramesh Chander v Veena Kausal* AIR 1978 SC 1807.

29 *Vinay Kumar v Purnima* AIR 1973 Raj 32; *Sambit Paraja v Sunita Paraja* AIR 2002 Ori 22 (application can be decided on affidavits).

30 *Sandeep Kumar v State of Jharkhand* AIR 2004 Jhar 22.

31 *Muniratnam Naidu v Shantamma* AIR 1971 Mys 25.

If the ground for interim maintenance is made out the court cannot impose any conditions on the spouse claiming such maintenance.³²

When the substantive petition is itself dismissed, there can be no question of making any order thereafter under this section.³³ There is conflict of opinion on this point.³⁴

Attention is invited to the undermentioned decision,³⁵ where it has been held that the words 'substantive petition' mean a petition putting to an end the marital status or causing a disruption of the marital status. It must however, be kept in mind that orders under this provision inure during the pendency of the main or substantive proceedings, whereas orders under s 25 are dependent upon the passing of a 'decree' disrupting the marital status as has been held by the undermentioned decision of the Supreme Court.³⁶ (See notes under s 25.)

An order for maintenance *pendente lite* and costs would inure during the pendency of the suit and an independent application would be necessary to the appellate court if any such maintenance or costs are sought pending any appeal.³⁷ Proceedings under s 25 are 'Proceedings under the Act' in the context of any application under this section.³⁸ An application for interim alimony is therefore maintainable during the pendency of an application for permanent alimony under s 25.³⁹

Pending Appeal: Pending Revision

The appellate court also has jurisdiction and power to make an interim order in terms of this section.⁴⁰ So also, has the High Court in a revisional application

32 *Latika Ghosh v Nirmal Kumar* AIR 1968 Cal 68.

33 *Nirmala Devi v Ram Dass* AIR 1973 P&H 48; *Chitralkha v Ranjit Rai* AIR 1977 Del 176; cf *Amrik Singh v Narinder Kaur* AIR 1979 P&H 211; covered in *Sohan Lal v Kamlesh* AIR 1984 P&H 332.

34 *Sohan Lal v Kamlesh* AIR 1984 P&H 332 (overruling *Nirmal Dev v Ramdas* AIR 1973 P&H 48); *Sudarshan Kumar v Deepak* AIR 1981 P&H 305 (partly overruled in *Sohanlal v Kamlesh* AIR 1984 P&H 305); *Banwar Lal v Kamla Devi* AIR 1983 Raj 229; *Madan Lal v Meena* AIR 1988 P&H 31 (application for setting aside *ex parte* decree for divorce held to be 'proceeding' under the Act); *EK Raghawan v KK Saraja* AIR 1987 Ker 151 and cases cited therein; *Vinod v Usha* AIR 1993 Bom 160 (wife can claim benefits under this section pending proceedings under O 9, r 4, CPC for restoration of petition. The court cannot allow withdrawal of such application if it adversely affects wife's claim); *Parchuri Rajya Lakshmi v Parchuri Viswa Sankara* AIR 1995 AP 147 (responsibility to pay maintenance goes beyond the closure or lapse of proceedings); *Lataben v Yogenda* AIR 1996 Guj 103.

35 *Chand Dhawan v Jawaharlal Dhawan* (1993) 3 SCC 406.

36 *Ibid.*

37 *Mukan Kanwar v Ajit Chand* AIR 1961 Raj 51.

38 *Chuni Lal v Krishna Rani* AIR 1983 P&H 241.

39 *Dashrath Yadav v Saroj* AIR 1989 MP 242.

40 *Annapuramma v Ramakrishna* AIR 1959 AP 49; *Subba Rao v Anasuyamma* AIR 1957 AP 170; *Arya Kumar v Ila* AIR 1968 Cal 276; *Jalasutram v Jalasutram* AIR

continued on the next page

filed under s 115 of the CPC.⁴¹

ASSESSMENT OF QUANTUM: 'HAVING REGARD TO THE PETITIONER'S OWN INCOME AND THE INCOME OF THE RESPONDENT'

The section lays down that in arriving at the quantum of interim maintenance to be paid by one spouse to another, the court must have regard to the petitioner's own income and the income of the respondent. Section 36 of the Indian Divorce Act 1896, lays down that the amount to be paid to the wife pendente lite may be such as the court deems just and also provides that such alimony shall in no case exceed one-fifth of the husband's average net income for the three years preceding the date of the order. In England, the powers of the court in the matter of making such orders have been from time to time extended by statute and the court is now empowered to make such interim orders for the payment of alimony as it 'thinks fit'. Where the parties are unable to agree, the normal proportion of the amount of alimony allotted to the wife is one-fifth of the total income of the husband and wife less the wife's income. The more recent trend in England, however, is not to lay stress on any such arithmetical rule but have regard to the disposable income of the husband and the income of the wife and assess the amount after taking into consideration all the facts and circumstances of the case including the conduct of the parties;⁴² nor do courts in India accept any such rigid and unreasonable rule.⁴³ At the same time, the order should not work out as a penalty.⁴⁴ If the husband does not disclose his income, the court may even rely on the evidence of the wife and assess his income.⁴⁵ Such assertions must, however depend on the proven facts.

1959 AP 49; *Chitra v Dhruba Jyoti* AIR 1988 Cal 98; *Khanindra Das v Kusum* AIR 1991 Gau 54 (interim order of maintenance pending appeal—appellate court—proper authority).

41 *Surendra Kumar v Kamlesh* AIR 1974 All 110, Matrimonial Causes Act 1950 ss 19–20 and 22; *Madan Lal v Santosh Kumari* (1983) 85 PLR 438.

42 *Chichester v Chichester* [1936] 1 All ER 271 (The President Sir Boyd Merryman enunciated certain broad principles, which though they relate mainly to the question of securing permanent maintenance, are referred to in England as of considerable guidance on the question of alimony pendente lite); *Griffith v Griffith* [1957] 1 All ER 494; *Waller v Waller* [1956] 2 All ER 234; *Rose v Rose* [1950] 2 All ER 311; *Mukan Kumar v Ajeetchand* AIR 1958 Raj 322; *Prasana Kumar v Sureswari* AIR 1969 Ori 12; *Sushila Devi v Dhani Ram* AIR 1965 HP 12; *Yogeshwar Prasad v Jyoti Rani* AIR 1981 Del 99.

43 *Dinesh v Usha* AIR 1979 Bom 173; *Dhirar Sen v Ramesh Chandra* AIR 1983 Guj 215; *PS Krishnamurthy v PS Umadevi* AIR 1987 AP 237; *Dharmichand v Sobha Devi* AIR 1987 Raj 159; *Vinod Dularai Mehta v Kanak Vinod Mehta* AIR 1990 Bom 120 (Income-tax return is not the sole guide for determining income).

44 *Veeru Gowda v Susheelamma* (1977) 1 Kar LJ 288.

45 *Pushpa Ram v Asanand* (1978) 80 PLR 300; *Renu Jain v Mahavir Prasad* AIR 1987 Del 43 (the court will in the exercise of its discretion, consider the financial position of the parties and may record evidence on the point); AIR 1988 Cal 83 ('income' does not include capital assets like lands and hereditaments).

If the plea of insufficiency of income is discountenanced on facts⁴⁶ or even the failure of the wife to prove the husband's earnings.⁴⁷

‘...HAS NO INDEPENDENT INCOME SUFFICIENT’

An order for maintenance pendente lite or for costs of the proceedings is conditional on the circumstance that the wife or husband who makes a claim for the same has no independent income sufficient for her or his support or to meet the necessary expenses of the proceeding. It is also implicit in the section that the order would not be made if the respondent to the application is shown to have no property or earning capacity, or is shown to have a very small income. However, the fact that the respondent is not receiving any income from property for the time being would not be sufficient answer to the claim if the court is satisfied that the property owned by the respondent is substantial. Reference may be made to the undermentioned cases.⁴⁸ It is no answer to a claim of maintenance that the wife is educated and could support herself since the services of the husband were terminated.⁴⁹ Reference may also be made to the undermentioned case⁵⁰ as to ‘income sufficient for the support’, which it was held should depend on and vary with the status and station of the husband. The use of the words ‘support’ in this section do not mean a bare existence, it is indicative of the fact that the claimant spouse is entitled to a proper amount of support. However, arithmetical equality is not intended while granting any amount.⁵¹ A spouse who voluntarily incapacitates oneself from earning, is not entitled to maintenance under this provision.⁵² The court must take into consideration the status of the parties and the capacity of the spouse to pay maintenance. A voluntary incapacity of a spouse to earn, on the other hand, cannot result in avoidance of the right of maintenance.⁵³ Reference is also invited to the undermentioned decision upon non-entitlement on facts

46 *Chandarani Soba v Kaushik Soba* AIR 2001 Jhar 61.

47 *Padmavathy v Laxminarayana* AIR 2002 Kant 424.

48 As to ‘independent income’ see *Gurmail Singh v Bhuchari* AIR 1980 P&H 120. As to where wife has support of the parents, see *Joshi v Ganga Devi* AIR 1980 All 130; *Preeti Archana v Ravindra Kumar* AIR 1980 All 29. In *Dev Dutt Singh v Rajiv Gandhi* AIR 1984 Del 320, disagreement has been expressed with the last mentioned decision as to the import of the expression ‘support’; *Prem Nath v Prem Lata* AIR 1988 Del 50 (property allegedly bequeathed to wife by her father subject of partition suit in dispute); *Neelam Malhotra v Rajinder* AIR 1994 Del 234.

49 *Chandana Roy v Goutama* AIR 2004 Cal 36.

50 *Chitra v Dhruba Jyoti* AIR 1988 Cal 98; *Hema v S Lakshmana Bhat* AIR 1986 Ker 130.

51 *V Usha Rani v KLN Rao* AIR 2001 Punj 371.

52 *Govind Singh v Vidya* AIR 1999 Raj 304.

53 *Rousseau Mitra v Chandana Mitra* AIR 2004 Cal 61. (*Jashir Sehgal v Dist Judge Dehradun* AIR 1997, SC 3397 distinguished).

wherein evidence was to the contrary.⁵⁴ Maintenance is always dependent on the factual situation. The court would therefore be justified in moulding a claim for maintenance based on the various factors in existence. The relief of maintenance could be refused when it was found that the petitioner was earning substantially well as compared to the respondent who was earning a meager amount.⁵⁵ The entitlement or otherwise of maintenance would obviously depend upon the peculiar facts and circumstances of each case.

DISCRETION OF THE COURT

The court exercises a wide discretion in the matter of granting alimony pendente lite but the discretion is judicial and not arbitrary or capricious. It is to be guided, on sound principles of matrimonial law and to be exercised within the ambit of the provisions of the section and having regard to the object of the Act. As a general rule, the court deems it prudent to adhere to the principle that a marriage de facto carries the right to alimony pendente lite and primarily has regard to the means of the parties. The order can be made even before the other party has filed its reply to the substantive petition on the merits of the case.⁵⁶ In a proper case, the court may make an order in case of a wife who had knowingly entered into second marriage with the husband whose second wife was alive⁵⁷ even though she may not be entitled to any maintenance under the Code of Criminal Procedure.⁵⁸ Even a pre-existing order under the Code of Criminal Procedure does not oust jurisdiction of the court.⁵⁹

The court would not be in a position to judge the merits of the rival contentions of the parties when deciding an application for interim alimony and would not allow its discretion to be fettered by the nature of the allegations made by them and would not examine the merits of the case. At the same time, there is nothing in the section to prevent the court from taking into consideration the conduct of the parties. A comparison of the language of this section with that of s 25 which deals with permanent alimony and maintenance shows that under the latter section, the conduct of the parties is an important factor for consideration in awarding the same. The words 'conduct of the parties' do not appear in the present section but the conduct of the parties would not be ignored by the court in making the order asked for or in assessing the amount of alimony. The matter is one for the court to deal with as it thinks just and reasonable in its unfettered

54 *Pranula Bhatia v Vijay Kumar Bhatia* AIR 2000 Raj 362 (husband dependent upon mother, uncontroverted facts, wife not entitled—contrary evidence).

55 *Manokaran v M Devaki* AIR 2003 Mad 212.

56 *Gangu v Pundlik* AIR 1979 Bom 264.

57 *Govindrao v Anandibai* (1977) Mah LJ 144.

58 *Bajirao v Tolanbai* (1979) Mah LJ 693.

59 *Surjit Kaur v Tirath Singh* (1977) 79 PLR 612.

discretion and the court has the power to make an order for alimony pendente lite for instance, in favour of a respondent wife notwithstanding the wife's adultery. In considering an application for such an order, the court would take into account all relevant circumstances, including the adultery, the conduct of the parties and any plea of conduct, conducting or condonation.⁶⁰ Cases are conceivable in which, although the court has power to award alimony pendente lite, no order may be made. Thus, for instance, in case of a wife who has brought cohabitation to an end by admitted misconduct for which the husband is not to be blamed or in case where the conduct of the erring spouse is shown to have caused exceptional hardship to the other or where the erring spouse is shown to have been guilty of exceptional depravity, the court may refuse to grant alimony pendente lite. The section confers on the court a general power to make orders for alimony pendente lite and the court would take into consideration the whole of the circumstances of the case although the prime consideration even in such cases would be the means of the parties.

In the exercise of its discretion under this section, it is open to the court to grant interim maintenance from the date of demand for the same by serving a notice on the other side after institution of the proceeding and not necessarily from the date of the application for the same.⁶¹ Though in some cases the view has been taken that the grant of interim maintenance should commence only from the date of application under this section, the view taken by different High Courts cannot be said to be quite uniform. Those decisions have been summarised in the undermentioned decision⁶² of the Kerala High Court.

The court can, in the exercise of its discretion, vary an order for interim maintenance if there is such change in the circumstances of the parties justifying variation.⁶³ There is nothing in the section which can disable the court, in an appropriate case, passing an order varying, modifying, rescinding or temporarily suspending any order made by it under the section, even though there is no provision relating to the same.⁶⁴ Orders of interim maintenance cannot be static and must take into consideration the changing income of the spouse directed to pay maintenance, such orders should be reviewed from time to time.⁶⁵

60 *Waller v Waller* [1956] 2 All ER 234; [1956] P 300, *Welton v Welton* [1927] P 162; contra *Lallubhai v Nirmalaben* AIR 1972 Guj 174; *Jogeshwar Prasad v Jyoti Rani* AIR 1981 Del 99 (unchaste wife—conduct relevant in deciding quantum); *Balbir Singh v Swaran Kanta* AIR 1981 Raj 266; *Vinod v Usha* AIR 1993 Bom 160 (husband casting aspersions on wife—wife apprehending danger in living with husband—maintenance cannot be refused).

61 *Sobhana Sen v Amar Kanta Sen* AIR 1959 Cal 455.

62 *Nalim v Velu* AIR 1984 Ker 214.

63 *Devki v Purshotam* AIR 1973 Raj 2.

64 *Ibid.* *Anuradha v Santosh Nath* AIR 1976 Del 246; *Laxmi Priya v Kamaprasad* AIR 1992 Ori 88.

65 *SS Bindra v Travinder Kaur* AIR 2004 Del 442.

The court can in the exercise of its discretion, take notice of an earlier undertaking by a party not to claim any maintenance.⁶⁶

In a case taking a peculiar twist, the husband sought for divorce and the wife applied for maintenance, this was partially granted. Both spouses challenged the order granting maintenance. The wife had also sought leave to sue *in forma pauperis*, which was disallowed. The appellate court quashed the order granting maintenance and granted the application to sue *in forma pauperis*. This was held to be an inconsistency and the matter was remanded for reconsideration.⁶⁷ Striking down of the defence and granting of orders without framing issues is also an inconsistency which may make the proceedings vulnerable.⁶⁸

FLOUTING ORDER OF INTERIM MAINTENANCE

The court can in the exercise of its inherent powers under s 151 of the Code of Civil Procedure, pass an order striking out the defence of a respondent husband if he deliberately and contumaciously flouts the order of the court under this section to give interim alimony pendente lite, to the petitioner-wife.⁶⁹ In collateral proceedings under the Hindu Adoptions and Maintenance Act and the Hindu Minority and Guardianship Act, the visitation rights of the husband can be restricted if the orders of interim maintenance are not complied with.⁷⁰

INTERIM MAINTENANCE FOR CHILDREN

There is some difference of judicial opinion on the question as to whether in an application for interim maintenance by the wife, the court has power to grant maintenance not only for the wife but also for the children although there may be no separate application under s 26 of the Act.⁷¹ It is submitted

66 *Pritam Singh v Rajinder Kaur* AIR 1983 P&H 239; *Kaushala Devi v Mst Ram* AIR 1981 HP 63.

67 *Lata v Civil Judge, Bulandshahr* AIR 1993 All 135.

68 *Love Kumar v Sunita Puri* AIR 1997 P&H 189.

69 *Jai Singh v Khini Bhiklu* AIR 1978 HP 45; *Malkan Rani v Krishan Kumar* AIR 1961 Punj 42; *Anuradha v Santosh Nath*, supra; *Veerappa Gowda v Sulochanamma* ILR (1973) Mys 370; *Madhuben v Mahendra* (1976) Guj LR 52; *Suseelamma v Raghunath Reddy* (1977) 1 AP LJ 180; *Binujak v Chandra* AIR 1987 Ori 167; *CS Mangalam v Velayudhan Asari* AIR 1993 Ker 181; *Ghasiram Das v Arundhati* AIR 1994 Ori 15. Also see notes under s 21 'Inherent powers of court'.

70 *Vinodchandra v Anupama* AIR 1993 Bom 232.

71 *Monoj Kumar Jaiswal v Lila Jaiswal* AIR 1987 Cal 230; *Baboolal v Prem Lata* AIR 1974 Raj 93; *Usha v Sudhir Kumar* (1937) ILR P&H 248; *Balbir Kaur v Raghubir Singh* AIR 1974 P&H 255 contra; *Akasam Chinna v Parvati* AIR 1967 Ori 163; *Chandrakant v Shardabai* (1977) 2 Kar LJ 29; *Bankim Chandra v Anjali* AIR 1972 Pat 80; *Mahendra Kumar v Snehalata* AIR 1983 Ori 74 (petition under s 26 not

continued on the next page

that where there is no possibility of any injustice being done to the husband, the court may make such an order for the benefit of the wife as well as the children of the marriage living with her without insisting on a separate application. The provisions for maintenance of dependents stem not only from legal rights, but also from moral obligations and are indicative of the progressive and ameliorative objects of the act. Thus a claim for the maintenance of a minor cannot be defeated on the technicality that s 26 was not added in such an application.⁷²

APPLICATION CONFINED TO SPOUSES

The claim for maintenance under this section can only be confined to the spouses, and at best, to the children. No other person can claim maintenance under this section.⁷³

COSTS

It is sometimes expressed that a petitioner or respondent wife is entitled to have her costs secured. The old principle that the husband alone must foot the bill may now be said to have disappeared. The section in effect rules that the court can in the exercise of its discretion direct any party to the proceeding, whether husband or wife and whether petitioner or respondent to the substantive proceeding, to pay the applicant wife or husband the expenses of the proceeding pending the hearing of the proceeding if it appears to the court that such applicant has no independent income sufficient for her or his necessary expenses of the proceeding. The court has absolute discretion in the matter and each case would be determined on its own merits. Reference may be made to notes under 'costs'. Reference may also be made to the undermentioned cases.⁷⁴ (Also see notes under 'Discretion of the court' above).

obligatory); *Subhasini v BR Umakanth* AIR 1981 Kant 115; *Narendra Kumar v Saroj* AIR 1982 AP 100; *Puran Chand v Kamala Devi* AIR 1981 J&K 5; *Damidharao v Meera* AIR 1987 Ker 78; contra courts' attention not drawn to s 26; *Purusbottam Das v Pushpa Devi* AIR 1982 Ori 270 (not within purview of this section); *Debi Prasad v Sandhya Debi* AIR 1985 Gau 97; *Gulal Chand v Sampati Devi* AIR 1988 J&K 22; *Kamlesh Arora v Jugal Kishore Arora* AIR 1990 P&H 168; *Raju Abrol v Adarsh Abrol* AIR 1990 HP 86; *Amit Kumar Sharma v Fifth Addl District Judge* AIR 1999 All 4; AIR 1981 J&K 5 and AIR 1972 Pat dissented from.

⁷² *Bulbul Samantaray v Dharendra Kumar* AIR 2003 Ori 154.

⁷³ *Amit Kumar Sharma v Fifth Addl District Judge* AIR 1999 All 4 (mother-in-law cannot claim maintenance under this section).

⁷⁴ *Priti v Kailash* AIR 1975 Raj 52; *Gangu v Pundlik* AIR 1979 Bom 264 (the words it may seem to the court to be reasonable apply also to the order for expenses); *Sudarshan Kumar v Deepak* AIR 1981 P&H 305.

APPEAL: SECTION 28

There was difference of opinion among the High Courts on the question whether an appeal lies against an order of the court of first instance on an application for maintenance pendente lite and expenses of proceedings started under the Act. The difference of opinion arose from different interpretations given to the language of s 28.

Section 28 has now been amended and it is abundantly clear that no appeal can lie against any such order. Any such order passed after the coming into force of the Amending Act of 1976, would also not be appealable,⁷⁵ such orders being interlocutory in nature.⁷⁶

Revision

With the amendments to the Code of Civil Procedure 1908, the jurisdiction of the High Courts to entertain a revision has also been circumscribed after the amendment in 2002.

An order granting maintenance pendente lite, being an order of an interlocutory nature, pending proceedings under the act which are coterminus qua the proceedings, no revision would be maintainable as such an order does not, obviously dispose of the matter finally between the parties.

Reference is invited to the under mentioned decision.⁷⁷

ENFORCEMENT OF ORDER: STAY OF PROCEEDINGS IF NECESSARY

See notes under s 21, ante on 'Inherent powers of Court: Stay of proceedings'. Also see notes above: 'Flouting order of interim maintenance'. The decree for alimony and maintenance is not extinguished on the death of the husband and is executable against the deceased husband's estate.⁷⁸ Attention is invited to the commentary on effect of stay of, the substantive proceedings on orders of interim maintenance, under s 21 *ante*.

25. Permanent alimony and maintenance.—(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance

⁷⁵ *Radheshyam v Laxmi Bai* AIR 1977 MP 271; *Subhasini v Umakanth* AIR 1981 Kant 115 (only revision may lie).

⁷⁶ *Ravi Saran Prasad v Rashmi Singh* AIR 2001 All 227 dissenting from *Ragbendra Singh v Seemabai* AIR 1989 MP 259 (appeal lies).

⁷⁷ *Ramavtar Verma v Chintamani* AIR 2004 MP 137

⁷⁸ *Aruna Mullick v Dorothea Mitra* AIR 1983 SC 916.

and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under subsection (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the court may deem just.

AMENDMENT

The amendments made in this section by the Amending Act of 1976, have been pointed out in the notes under this section.

PERMANENT ALIMONY AND MAINTENANCE

The section, although it recognises the right of the wife and the husband to be *in equali jura* in the matter of maintenance, when a decree is passed granting relief in any matrimonial cause, is primarily intended to secure maintenance and support for the wife in whose favour a decree is made, granting any of the reliefs under the Act. In the majority of cases that come before the court the decree is for judicial separation or for divorce on the ground of the delinquency of the other spouse who is charged with having committed adultery or cruelty or with desertion. The obligation of the husband to provide for his wife's maintenance and support does not come to an end simply on the passing of a decree for any of the reliefs which the court is empowered to grant under the Act even when the decree is in favour of the husband. The court is empowered to direct that the amount to be paid by one spouse to another shall be in the form of a gross sum or in the form of monthly or other periodical payments. The duration of such payments is limited to the life of the applicant. The court is also empowered to vary, modify or rescind any such order in view of change in the circumstances of any party. The order may be rescinded upon proof of remarriage or unchastity of the party in whose favour it has been made.

The section confers power upon the court to grant a right on either spouse to claim permanent alimony and maintenance under it.⁷⁹ The mere fact that the wife had not asked for interim maintenance is not a bar to her claim for permanent maintenance.⁸⁰ Nor is the fact that the wife had not filed a separate application for maintenance. The claim of the wife for maintenance in her written statement has been construed as sufficient, in view of the provisions of s 23(A) of this Act.⁸¹

This section applies only to Hindus.⁸²

The right to maintenance being a statutory right, a party cannot contract herself or himself out of the same. Thus, a wife cannot bind herself by agreement with her husband to forgo her right of applying to the court for maintenance in matrimonial proceedings between them.⁸³ The jurisdiction of the court to award maintenance is not ousted, as such an onerous term is opposed to public policy.⁸⁴ The principle will not, however, apply to an undertaking given by a party to the court not to ask for variation of an order for maintenance made by the court.⁸⁵

Parties sometimes enter into what are termed as pre-nuptial agreements. Such agreements deal with the distribution of property, maintenance, custody of children etc in case of a divorce. Such agreements are more in vogue in other countries. As aforesaid, a wife cannot bind herself to forgo her right of maintenance, since it is a statutorily enforceable one, however, if there is a settlement between the parties as regards settlement of an ascertained amount and other benefits to be conferred as per the agreement, the court is not precluded from adjudicating on the enforceability of such agreement between the spouses. The court would have jurisdiction to look into the circumstances under which such an agreement was reached and must arrive at a decision, given the totality of the facts.

Attention is invited to the undermentioned decision and refer the topic 'Agreement not to sue for maintenance' *infra*.⁸⁶

An order for maintenance can be made under the section, not only in favour of the wife but also in favour of the husband, by the court, passing any decree for restitution of conjugal rights, judicial separation, divorce or nullity of void or voidable marriage.

79 *Govindrao v Anandibai* AIR 1976 Bom 433.

80 *Arun Vamanrao v Lina Arun* (1973) 14 Guj LR 301.

81 *Surajmal v Rukminibai* AIR 2000 MP 48; *NR Gopal v KG Banumathi* AIR 2000 Mad 48.

82 *Bajirao v Tolanbai* (1979) Mah LJ 693.

83 *Hyman v Hyman* [1929] AC 601 (deed of separation); *Bharucha v Bharucha* (1945) 17 Bom LR 514 and cases cited therein; *Manjit Singh v Sarita Kiran* (1983)

85 PLR 260 (right could be validly relinquished); see 'Agreement not to sue for maintenance'.

84 *Geeta Gokarna v Satish Gokarna* AIR 2004 Bom 345.

85 *Russell v Russell* [1956] 1 All ER 466.

86 *Ravi Singhal v Monali Singhal* (2001) 8 SCC 1.

Under the Special Marriage Act 1954 and other analogous legislation, the wife alone is entitled to ask for alimony pendente lite and permanent alimony or permanent maintenance. In England, the Matrimonial Causes Act 1950, makes one exception and lays down in ss 19 and 20 that on any petition for divorce or judicial separation, the court may make orders for alimony pendente lite and for permanent alimony and maintenance in favour of the husband where a wife has filed a petition for divorce or judicial separation against the husband on the ground of his insanity. The Bill, as originally presented, did not contain any provision for granting alimony pendente lite or permanent alimony or maintenance to the husband. However, as the joint committee observed, the change was made to 'secure that 'alimony' is payable in either case, that is to say where the husband has no independent income but the wife is possessed of means, she shall be as much answerable for the payment of 'alimony' as the husband normally is'. The juristic capacity of woman emphasised in the Constitution has been equalised by the present enactment in matters of marriage and divorce and by the Hindu Succession Act 1956, in matters of inheritance and succession with that of other citizens.

The present rule, though it introduces an unusual feature in this branch of the law, has the merit of enabling the court to grant effective relief in deserving cases, for instance, that of a destitute husband against whom proceedings under the Act are adopted by the wife and decree is passed on the ground of his insanity or his being afflicted with leprosy or where for instance a wife who is possessed of substantial property has unreasonably deserted the husband who has no independent income.

The section refers to the payments to be made under it by one spouse to another as maintenance and does not use the expression 'permanent alimony', though that expression is used in the marginal note to the section. Permanent alimony is the expression used under English law in the context of provision ordered to be made by the court for wife on her petition for judicial separation being granted. The relevant statutory enactments in England is a historic development of law. Before the first Divorce Act in England, a wife could not obtain from the ecclesiastical court divorce *mensa et thoro* (judicial separation) and the allowance allotted to her was named permanent alimony which was, as a general rule, one-third of the husband's income. The operation of the rule was extended and the same principle was applied in cases decided under the successive divorce Acts in England, when relief by way of dissolution of marriage by divorce was granted to the wife. At one stage, the view was taken that the wife who claimed maintenance after a decree of divorce in her favour would have pecuniary interest in seeking such relief and that would not accord with the policy of law. That view was discountenanced and it was ruled that the principles on which the ecclesiastical courts awarded permanent alimony in case of judicial separation should be applicable to cases where relief by way of divorce or nullity of

marriage was granted although in cases under the latter category she ceased to be the wife or was declared not to have been the wife of the other party and relinquished her character as wife and the name of the husband. It will be noticed that the law enacted in the present section adopts those general principles of English law and makes them applicable to the case of either spouse. The basal thought is that a spouse who is compelled to seek relief by way of restitution of conjugal rights or judicial separation or dissolution of marriage by divorce⁸⁷ or secures annulment of it for no fault attributable to such spouse, should in the matter of maintenance and support, be entitled to expect to be in the same position in which she or he would have been if the other spouse had properly discharged his or her marital obligations or had not disabled himself or herself from discharging the same.⁸⁸

SCOPE

The section vests wide power in the court making orders for maintenance and support of one spouse by the other where it passes any decree for restitution of conjugal rights, judicial separation, dissolution of marriage by divorce or annulment of the marriage on the ground that it was void or voidable. In the undermentioned case,⁸⁹ the High Court of Madras has expressed the view that a second wife whose marriage with the respondent was a nullity on the ground that the husband had a wife living at the time of his marriage with her, is not entitled to alimony or maintenance under this section. It is submitted that the present section applies inter alia to a marriage which may be null and void under s 11 read with s 5(1) and the correctness of the above view must be doubted. The High Court of Bombay⁹⁰ has disagreed with the view expressed by the High Court of Madras. Thus, the applicability of the section to a void marriage during the subsistence of an earlier marriage, and the entitlement to maintenance has been the subject of differing judicial pronouncements. After the above decisions were rendered, the High Court of Bombay had held in another decision that such a spouse was entitled to maintenance.⁹¹ A recent Full Bench decision of the same High Court⁹² has, while overruling the decision in *Krishnakant Vyas supra* and *Shantaram v Dagubai*,⁹³ held that the section cannot be construed to

87 The order for maintenance can be made inter alia in a case where divorce is decreed on the ground of presumption of death under s 13(vii) if the respondent is subsequently found to be alive. *Deacock v Deacock* [1958] 2 All ER 633.

88 *Dharamshi v Bai Saker* AIR 1968 Guj 150, 153.

89 *Narayanadaswami v Padmanabhan* AIR 1966 Mad 391; *Gurcharan Kaur v Ram Chand* AIR 1979 P&H 206 (decree of nullity refused).

90 *Gomindrao v Anandibai* AIR 1976 Bom 433 (marriage by second wife with knowledge that first wife was living); *Dayal Singh v Bhajan Kaur* AIR 1973 P&H 44.

91 *Krishnakant v Reena* AIR 1999 Bom 127.

92 *Bhausahab v Leelabai* AIR 2004 Bom 283 (FB).

93 AIR 1987 Bom 182.

mean that the spouse of such marriage is entitled to maintenance. The court held that since a void marriage is no marriage in the eye of law, no legal obligation could be imputed to maintain a 'spouse' of such a marriage. The reasoning attributed is that since the type of decrees contemplated under s 12, relating to voidable marriages are different from a decree of nullity under s 11, which deals with void marriages. A void marriage being no marriage, no maintenance could be granted to the 'wife' of such a union. It was further held that it was not possible to countenance a decree of nullity under s 5(1) as also being a petition affecting the marital status of the parties and thus an application under this section was not maintainable. The decision of the High Court of Andhra Pradesh in *Abayolla M Subba Reddy v Padmamma*,⁹⁴ a decision under s 18 of the Hindu Adoptions and Maintenance Act, which has taken the view that a 'second wife' cannot maintain an application under the said provision was referred to. The decision of the Supreme Court in *Yamunabai v Anantrao*,⁹⁵ which held that the expression 'wife' used in s 125 of the Code of Criminal Procedure 1973 would have a restricted meaning and such a wife was not therefore entitled to maintenance was also referred to.

So far as proceedings under the present section are concerned, it is submitted that in view of the decision of the Supreme Court in *Chand Dhawan v Jawaharlal Dhawan*, *infra*, which took into consideration the scheme of the Hindu Marriage Act, in relation to a disruption of the marital status of the parties and consequential rights of maintenance, categorically held that 'the legislature while codifying the Hindu Marriage Act, preserved the right of permanent maintenance... dependent on the Court passing a decree of the kind envisaged under sections 9 to 14 of the Act' clearly indicates that a decree of nullity is also one of the decrees mentioned in s 11, which seeks to declare a marriage as being void.⁹⁶ It is submitted that in view of the above decision, the words 'any decree' used in the section and as interpreted by the Supreme Court, cannot exclude a claimant wife of a null and void marriage from the purview of maintenance, once there is a decree of nullity, putting an end to the marriage. It is further submitted that in *Rajeshbai v Shantabai*,⁹⁷ the High Court of Bombay referred to an earlier decision in *Govindrao v Anandibai*⁹⁸ and held that such a wife was entitled to the benefit of the provisions of maintenance. The court held that,

there can be a class of persons, who, as I propose to call are 'illegitimate wives, or widows' 'who can be the subject of benefaction of law of maintenance, notwithstanding that eventually their legal status is annulled.

94 AIR 1999 AP 19 (FB).

95 AIR 1988 SC 644.

96 (1993) 3 SCC 406.

97 AIR 1982 Bom 231.

98 AIR 1976 Bom 433.

Undoubtedly a female spouse united by marriage enters upon a status and is conferred with immediate as well as inchoate rights attached to such status by virtue of her marriage and that is because of the gift of conferment of the law. When the status is shaken and found to have no sanction, it does not follow that even the inchoate rights of such person are totally eclipsed.

Attention is invited to the commentary under s 11 *supra*, where it has been stated that:

A marriage which is void ab initio, does not alter or affect the status of the parties, nor does it create between them any rights and obligations which must normally arise from a valid marriage except such rights as are expressly recognised by the Act. Thus for instance, the provisions of ss 24 and 25 relating to maintenance pendent lite and costs and permanent alimony and maintenance, apply to parties to such marriage and it is competent to the court to pass any such order in a proceeding for a declaration of nullity of marriage under this section.

If the above observations are read in conjunction with the decision of the court in *Chand Dhawan's* case *supra*, and in context of the observations made by the High Court of Bombay (above), inexorably point to the conclusion that a spouse of a void marriage cannot be denied a claim of maintenance, once a decree of nullity is granted. The Supreme Court,⁹⁹ has now held, that once a decree of nullity is passed in respect of such marriage, the claimant spouse is entitled to maintenance. The court based the decision upon *Chand Dhawan's* case *supra*, holding that the words 'all kinds of decrees' as interpreted and explained above, would include a decree of nullity as well.

Attention is invited to the commentary under s 18(2)(d) of the Hindu Adoptions and Maintenance Act 1956, where a similar question of entitlement to maintenance has been discussed in relation to the wording of that section. The amount of permanent alimony or permanent maintenance to be granted and in some degree, the question whether or not it should be allowed in any such case, is a matter within the discretion of the court.¹

The words 'while the applicant remains unmarried' which appeared in the original sub-s (1) were deleted by the Amending Act of 1976, to clarify the language. Reference may be made to sub-s (3). In the undermentioned cases, it was held that the words referred to duration of the liability, that is to say, permanent alimony cannot be directed to be paid after the applicant remarried.²

Permanent alimony can be awarded in case of a decree for restitution of conjugal rights while the marriage continues to subsist.³

99 *Ramesh Chandra Daga v Rameshwari Daga* (2004) 10 JT 366.

1 Reference may be made to notes under 'Discretion'. Also see notes under 'Order can be made in favour of unsuccessful spouse' and 'Conduct of the parties'.

2 *Sebadri v Jayalakshmi* AIR 1963 Mad 283, *Mmaram v Dasarath* AIR 1963 Cal 128.

3 *ARM Rajoo v Hansa Rani* AIR 1975 Mad 15.

In the undermentioned case,⁴ it has been held that proceedings under this section are in the nature of continuation of the main proceeding and maintenance pendente lite can be allowed even from a date prior to that of the application under s 24. It has also been held that the proceedings under the present section are proceedings under the Act, although s 28(2) may suggest otherwise.

‘...COURT EXERCISING JURISDICTION UNDER THIS ACT’

The section is wide enough to enable the court exercising jurisdiction under the Act, that is, under any of the provisions of the Act, including proceeding for annulment, to grant permanent alimony.⁵ An order for maintenance under the present section can be made by the court to which the substantive petition for restitution of conjugal rights, or judicial separation or dissolution of marriage by divorce or annulment of the marriage on the ground that it was void or voidable had been presented under s 19 of the Act and which has heard the same. The application for maintenance may be incorporated in the substantive petition itself or may be in the form of a separate application but must be in conformity with the rules of pleading that may have been prescribed by the rules made by the High Court in that behalf and contain all the particulars required by such rules.⁶ In the undermentioned case,⁷ the Supreme Court was in favour of the view that, even if it be accepted that a separate suit for declaration of charge could not lie in the situation that had arisen in that case, such a suit could be treated *ex debito justitiae* as execution application in respect of a decree or permanent alimony and proper relief would be given to the widow decree-holder.

‘...AT THE TIME OF PASSING ANY DECREE OR AT ANY TIME SUBSEQUENT THERETO...’

The application for maintenance may be made at the time of passing of the decree for restitution of conjugal rights or judicial separation, or dissolution of marriage by divorce or annulment of the marriage on the ground that it is void or voidable or even at any time subsequent thereto⁸ and, there is

4 *Chunilal v Krishna Rani* AIR 1983 P&H 241.

5 *Soumyanarayanan v Jayalakshmi* AIR 1975 Mad 196; *Modilal Jain v Lakshmi Jain* AIR 1991 Bom 440 (the section provides sufficient guidelines to adjudicate a claim of maintenance).

6 *Seeta Ram v Phooli* AIR 1972 Raj 313; *Munirsawmy v Hamsa Rani* AIR 1975 Mad 15; *Darshan Kaur v Mallock Singh* AIR 1983 P&H 28.

7 *Nandarani v Indian Air Lines* AIR 1983 SC 1201.

8 *Dharamshi v Bai Saker* supra; *Durga Das v Tara Rani* AIR 1971 P&H 141; *Natbulal v Mana Devi* AIR 1971 Raj 208; *ARM Rajoo v Hansha Rani* AIR 1975 Mad 15;

continued on the next page

no bar of limitation in the matter of presentation of such application. Nor would delay, however great in presenting the application, be any bar to the claim for maintenance. Section 23(1)(d), which in effect lays down that no relief will be granted under the Act where there has been unnecessary or improper delay in instituting the proceeding, applies only to substantive proceedings for any of the reliefs mentioned above and not to an application for maintenance under this section which provides only for ancillary relief and is incidental to any such proceeding for substantive relief.

In a case where the husband's petition for divorce was pending and the wife prayed for interim maintenance for the children which came to be rejected, and the appeal of the wife was also dismissed, subsequently, the wife instituted proceedings for judicial separation and also claimed maintenance for the children. It was held that the court could pass orders for maintenance only from the date of presentation of proceedings by the wife. This is due to the fact that the orders passed earlier refusing maintenance had become final and the wife would therefore, be entitled to claim alimony in proceedings instituted by her, which were separate proceedings, subsequent in point of time.⁹

The words 'at the time of passing any decree or any time subsequent thereto' indicate that an order for permanent alimony or maintenance in favour of the wife or the husband can only be made when a decree is passed granting any substantive relief under the Act and not where the main petition itself is dismissed¹⁰ or withdrawn.¹¹ The words 'at the time of passing any decree or at any time subsequent thereto' used in the section were interpreted differently by different High Courts. The High Courts of Bombay, Delhi, Gujarat, Calcutta, Orissa, Punjab and Haryana, Rajasthan, Allahabad and Madras had interpreted the section as stipulating that if the application for substantive relief under this Act had been dismissed, the court could not grant the ancillary relief of alimony under this provision. This view was on the basis that the word 'decree' in the section was with reference to decrees under the provisions of the Act, which put to an end the marital status of the parties.¹²

Yogeshwar Prasad v Joyti Rani AIR 1981 Del 99; *Shyamati v Ashim Kumar* AIR 1988 Cal 124 (meaning of expressions 'petition' and 'application' examined in detail).

9 *Sangeeta v Balkrishna* AIR 1994 Bom 1.

10 *Devasakayam v Devamony* (1923) 46 Mad 133; *Minarani v Dasarath* AIR 1963 Cal 128; *Aksam Chinna v Parbati* AIR 1967 Ori 163; *Purushotam v Derki* AIR 1973 Raj 3; *Gurbachan Kaur v Ram Chand* AIR 1979 P&H 206; *Sandhya v Gopinath* AIR 1983 Cal 161 (appeal court made an order for permanent alimony in an appeal allowing decree for restitution of conjugal rights and reversing order of the trial court); *Darshan Singh v Das* AIR 1980 Raj 102.

11 *Shantaram v Hirabai* AIR 1962 Bom 27, 63 Bom LR 76.

12 *Sanataram v Hirabai* AIR 1962 Bom 27; *Vinodchandra v Rajesh* AIR 1988 All 150; *P Shankar v P Vasantha* AIR 1995 AP 155; *Ranganathan v Shyamala* AIR 1990 Mad 1; *Derinder Singh v Jaspal Kaur* AIR 1999 P&H 229; *Badr Prasad v Umila* AIR 2001 MP 106.

The High Courts of Andhra Pradesh and Bombay¹³ were of the opinion that dismissal of the proceedings for reliefs under this Act was no bar to the grant of relief under this provision. There was thus, a divergence of judicial opinion amongst the courts as to the grant of relief under this section.

The Supreme Court has now held that the words 'decree' in the section refer to decrees under the provisions of ss 9–14 of the Act which result in disruption of the marital status of the parties. It has been held that if relief under any of the sections enumerated is declined, the ancillary relief of maintenance could not be granted.¹⁴ The reasoning on which the court held this was that the words 'any decree' used in the section encompass only such decrees which grant relief of disruption of marital ties or confer or take away any legal status relating to the marriage and that the decree of dismissal of such proceedings does not fall within the scope and ambit of 'any decree'.

In light of this decision of the Supreme Court, the decisions of the High Courts of Andhra Pradesh and Bombay are incorrect and the decisions rendered by the other High Courts take the correct view. The High Court of Rajasthan does not seem to have referred to the decision of the Supreme Court in *Chand Dhawan's* case supra, therefore, that decision also takes the incorrect view and is not good law in view of the decision of the Supreme Court.¹⁵

The spouse seeking the relief of maintenance can do so under the provisions of this Act, but there is an embargo on the court granting the same. As mentioned earlier, it is evident that the court can grant relief under this section only on the eventuality that the proceedings for disruption of the marital status as enumerated in ss 9–14 are decreed. If such proceedings result in a decree of dismissal of proceedings, the claim for maintenance must necessarily fail. The spouse, unsuccessful in getting any relief under this section, on failure of the proceedings for getting substantive relief can then agitate the claim under the provisions of s 18 of the Hindu Adoptions and Maintenance Act 1956. The court cannot, however, grant the relief of maintenance in proceedings under one enactment in proceedings under the other. Thus, in proceedings under this enactment, it is not permissible and the court is not at liberty to grant relief under the provisions of the Hindu Adoptions and Maintenance Act 1956.¹⁶

The reason for this distinction of denial of relief in relation to the proceedings for adjudication of claims of maintenance is a moot question which goes to the root of jurisdiction of the court. This is so, since, a claim for maintenance under the provisions of this section is dependent on the

13 *Sadanand v Sulochana* AIR 1989 Bom 220; *Silla Jagannadha v Lalitha Kumari* AIR 1989 AP 8; AIR 1991 Bom 440 (words 'any decree' include a decree refusing matrimonial relief and therefore, claim for maintenance within jurisdiction of court).

14 *Chand Dhawan v Jawaharlal Dhawan* (1993) 3 SCC 406.

15 *Sukhdev v Santosh* AIR 1998 Raj 12 (no longer good law).

16 *Chand Dhawan v Jawaharlal Dhawan* (1993) 3 SCC 406.

passing of a decree, leading to disruption of the status of the spouses or a marital disruption, whereas the claim of a spouse under the provisions of the Hindu Adoptions and Maintenance Act 1956 does not. Under that Act, the spouse can seek maintenance under the provisions of s 18(1) during the lifetime of the claimant. Section 18(2) gives a right to the wife to claim maintenance while living separately from her husband without giving up her claim to maintenance. Hence, the wife can claim maintenance under that section while her marriage is sustaining, whereas the right to claim maintenance under the provision is dependent upon the disruption of the marriage resulting in a decree. Attention is invited to the undermentioned decision which has held that a divorced wife can seek maintenance only under this Act and not under the Hindu Adoptions and Maintenance Act 1956.¹⁷ The jurisdiction vested in the court under both the enactments is separate and distinct. The rule postulates that if no request for alimony was made at the time of passing the decree, the application for same may be made subsequently. It does not mean that where such application was rejected at the time of passing of the decree, it could be renewed subsequently.¹⁸ The position would be different if the subsequent application can be made under sub-s (2). The rule laid down in the section relates only to ancillary relief which is incidental to the substantive relief that may be granted by the court, although the incidental relief may be given to either party to the petition.¹⁹ The expression 'any decree' has been used having regard to the various kind of decrees which may be passed under the provisions of the Act and includes a decree for restitution conjugal rights.²⁰ A decree for restitution of conjugal rights against the petitioner is, therefore, no bar to his or her claim for alimony or compensation under this section, if the case is otherwise a fit one for such relief. In any such case it is not necessary that the party should file a separate suit for maintenance under the Hindu Adoptions and Maintenance Act 1956, though ofcourse, the court in passing an order under this section would bear in mind the provisions of that Act.²¹ An application under the section can even be preferred before the trial court,

17 *Panditrao v Gayadabai* AIR 2001 Bom 445.

18 *Susheela v Jagannadban* AIR 1964 AP 247.

19 The view expressed in this paragraph has been accepted by the High Court of Gujarat in *Dharamshy v Bai Saker* AIR 1968 Guj 150; *Harilal v Lilavati* AIR 1961 Guj 202, 206; *Shantaram v Malti* AIR 1964 Bom 83; *Sisir Kumar v Sabita Rani* AIR 1972 Cal 4; *Sushama v Satish Chander* AIR 1984 Del 1 and cases cited there (analysis of the section and historical perspective); *Yogeshwar Prasad v Jyoti Rani* AIR 1981 Del 99; *Rajagopalan v Kamalammal* AIR 1982 Mad 187 (divorce decree against a wife does not disentitle her to claim permanent alimony and maintenance even subsequently); *Modilal Jain v Lakshmi Jain* AIR 1991 Bom 440.

20 *Ram Piary v Piara Lal* AIR 1970 P&H 341; *Nathulal v Mana Devi* AIR 1971 Raj 208; *Modila Jain v Lakshmi Jain* supra (any decree—means and includes—order refusing to grant matrimonial relief); overruled by *Chand Dhawan* supra.

21 *Seeta Ram v Phooli* AIR 1972 Raj 313; *Nandarani v Indian Airlines* AIR 1983 SC 1201.

even though an appeal against the grant of divorce is pending before the appellate court. There is no embargo against the trial court entertaining such application.²²

‘...ON APPLICATION MADE TO IT BY EITHER THE WIFE OR THE HUSBAND’

An order for permanent alimony or maintenance under this section cannot only be made in favour of the wife but may be made in favour of the husband by the court passing any decree for restitution of conjugal rights, judicial separation, divorce or nullity of void or voidable marriages. The expressions ‘the wife’ and ‘the husband’ have been used here as convenient terms to refer to either party to the substantive petition and not merely the successful party, in case of any such decree. The application can be made even by a spouse against whom a decree for nullity may have gone and has ceased to be the wife or the husband at the date of the application.²³

It would seem by parity of reasoning from the undermentioned decision of the Supreme Court²⁴ that a decree for alimony passed under this section would not become extinguished upon the death of the husband and the assets left by the husband would be liable to be proceeded against in the hands of his legal heirs for satisfaction of the same.

As already pointed out, in the notes under the preceding head, an order for permanent alimony or maintenance in favour of the wife or the husband can only be made where a decree is passed granting substantive relief in any such proceeding and not where the main petition itself is dismissed because the section relates only to ancillary relief. A respondent to any such petition which is dismissed, who wants this ancillary relief, will have to adopt substantive proceedings for any relief under the Act and the question of maintenance can arise if such proceeding terminates successfully in his or her favour.

ORDER CAN BE MADE IN FAVOUR OF UNSUCCESSFUL SPOUSE

The language of the section is wide enough to empower the court to make an order of allotment of permanent alimony or for permanent maintenance

²² *Surendra Kumar Bhansali v Judge, Family Court* AIR 2004 Raj 257.

²³ *Dharamshi v Bai Sakar* AIR 1968 Guj 150; *Durga Das v Tara Rani* AIR 1971 Punj 141 (FB); *Dayal Singh v Bhajan Kaur* AIR 1973 P&H 44; *Sisir Kumar v Sabita Rani* AIR 1972 Cal 4; *Kuldip Chand v Geeta* AIR 1977 Del 124; *Govindrao v Anandibai* AIR 1976 Bom 433 (second marriage while first wife was living); *Ratnaprabha v Shadoksharai* AIR 1982 Kant 170; *Lalit Mohan v Tripta Devi* AIR 1990 J&K 7 (in the case of the husband meeting with head injury, permanently disabled, it was held that husband can claim relief from earning wife).

²⁴ *Arun Mullick v Dorothea Mitra* AIR 1983 SC 916 (case under the analogous s 37 of the Special Marriage Act 1954); *Gurdev Kaur v Channo* AIR 1986 P&H 251.

in favour of the respondent against whom the decree has been passed and there is nothing to prevent the court from making any such order if in the exercise of the discretion vested in it the court deems it just to do so having regard to all the relevant facts and circumstances of the case including the conduct of the parties.

DISCRETION

In England, it has been held that an order for permanent alimony can be made by the court in favour of a wife even if a decree for judicial separation has been passed against her on the ground of her adultery²⁵ or cruelty.²⁶

The discretion has also been exercised by the courts in England and permanent maintenance awarded to the respondent in case where decree of nullity has been passed against her on the ground that she had a husband living at the time of marriage,²⁷ and, where the marriage has been annulled on the ground of wilful refusal on her part to consummate the marriage.²⁸ It has been held there that in all cases under this head, the court has an absolute discretion vested in it to be exercised according to the circumstances of each case. So in a case where the wife was found guilty of adultery and divorce was granted, the court being satisfied that she was in delicate health and quite unable to support herself and earn her own living and that she was entirely without means and had no friends or relations who would support her, ordered the petitioner to secure to her the sum of £1 per week for life *dum sole et casta vixerit*, although the petitioner's conduct had been unimpeachable and he had opposed the making of the order.²⁹

So wide is the discretion vested in the court under the present section in this regard that an order under it may, for instance, be made in favour of a wife even if a decree for judicial separation has been passed against her on the ground of adultery or cruelty or desertion on her part. The discretion is judicial and would be exercised in favour of a spouse found guilty of matrimonial misconduct, only where the court is satisfied that such an order should be made in the interest of justice. The same considerations would apply where the court passes a decree for any other relief under the Act and the respondent, though shown to have been guilty of matrimonial offence or to have been in the wrong, can ask for an order for permanent

25 *Goodden v Goodden* [1891] P 395, [1892] P 1 (CA).

26 *Prichard v Prichard* (1864) 3 Sw & Tr 523, 10 LT 789.

27 *Ramasay v Ramsay* (1913) 108 LT 382.

28 *Dailey v Dailey* [1947] 1 All ER 847, [1927] 2 All ER 269 (CA).

29 *Ashcroft v Ashcroft and Roberts* [1902] P 270. Reference may be made to the observations on the exercise of discretion over maintenance in *Clear v Clear* [1958] 2 All ER 353, 357-58, *Sydenham v Sydenham* [1949] All ER 190, 198 per Denning LJ.

maintenance even when dissolution of marriage by divorce or annulment of the marriage is decreed against the respondent.³⁰

There is, however, some conflict of opinion on the subject. In a case decided by the High Court of Kerala,³¹ which was later overruled,³² a finding of unchastity was recorded against the wife and a decree for judicial separation was passed against her and it was held that no order for maintenance could be passed in her favour under sub-s (1) of this section, because the court had no discretion whatever in the matter. In a case decided by the High Court of Jammu and Kashmir,³³ agreement was expressed with the above view. The above decision of the Kerala High Court was overruled by that court in the undermentioned case.³⁴ In the case referred to above, the wife who claimed maintenance had been living in adultery and on the merits of the case, the court would not in any case have exercised its discretion in her favour. In both these cases, reliance was placed on the provision contained in sub-s (3) of this section. The High Court of Calcutta, on the other hand, has expressed the view that the matter is one of discretion the court and that the court would not in the exercise of its discretion award any maintenance to the guilty wife, unless there are very special circumstances.³⁵ In another decision, the same High Court has expressed the view that in any such case the guilty wife would be entitled to a bare subsistence allowance and that she would lose that right when she was able to earn a living.³⁶ The High Court of Bombay³⁷ emphasised this element of discretion and held that maintenance could be awarded even after a decree of divorce.

It is submitted that sub-s (3) should not be so read as to leave no discretion whatever in the court in the matter of awarding maintenance to an erring wife simply on the ground that she had been found to have committed adultery and relief had been granted to the husband on that very ground. The matter is one of discretion with the court under sub-s (1) and the discretion would be exercised only after taking into consideration all the aspects of the case including her conduct, and maintenance would be awarded to her if so required by ends of justice. Being a matter of discretion, there can be no hard and fast rule applicable to all cases. Sometimes, the task is not easy but the court, if it decides to award maintenance, has to fix the amount as it best can. There can be no

30) *Dharamshi v Bai Saker* AIR 1968 Guj 150; *Rajender Parkash v Roshni Devi* AIR 1981 P&H 334.

31) *Raja Gopalan v Rajamma* AIR 1967 Ker 181.

32) *K Kunhikannan v NV Malu* AIR 1973 Ker 273.

33) *Sardari Lal v Vishano* AIR 1970 J&K 150.

34) *K Kunhikannan v NV Malu* AIR 1973 Ker 273.

35) *Sachindra Nath v Banamal* AIR 1960 Cal 575; *Jagdish v Manjula* AIR 1975 Cal 64.

36) *Amar Kanta v Sovana Sen* AIR 1960 Cal 438.

37) *Gulab v Kamal* AIR 1985 Bom 88.

set of fixed principles applicable to all cases of the nature that may fall for consideration under this head and the decision must rest on the facts of each case and the sense of propriety and moral justice of the court. The respondent would be in a strong position when the decree has gone against the respondent on the ground of insanity or the respondent's suffering from leprosy or on any ground where, though relief is granted to the petitioner, it cannot be said that the respondent was guilty of any matrimonial offence or any blameworthy conduct.

RESUMPTION OF COHABITATION

Resumption of cohabitation by the parties in certain cases or orders for maintenance awarded under this section, as for instance, in a case of a decree for judicial separation, may have the effect of nullifying the order for maintenance. The Andhra Pradesh High Court had earlier taken the view that such resumption would nullify the order of maintenance.³⁸ A recent decision of the same High Court³⁹ has taken a contrary view by drawing analogous reasoning from a decision of the Supreme Court under s 125 of the Code of Criminal Procedure 1973.⁴⁰ In that decision, the Supreme Court held that an order of maintenance under that section would operate until it is either altered or vacated in terms of the provisions of the Code itself. Whether there has been any such resumption would not depend so much on the duration of the period of such resumption but would depend on the animus of the parties and their attitude in coming together again.⁴¹

‘...GROSS SUM OR SUCH MONTHLY OR PERIODICAL SUM FOR A TERM NOT EXCEEDING THE LIFE OF THE APPLICANT’

The section empowers the court to award for the maintenance and support of the applicant a gross sum or to direct monthly or other periodical payments to be made by the respondent to the applicant. The matter is of the discretion of the court⁴² and ordinarily, the court as well as the parties prefer that the payments should be periodical and a gross sum is generally awarded when the parties are agreeable to any such arrangement. The periodical payments are to be for a term not exceeding the life of the applicant.

³⁸ *Ansuya v Rajaiah* AIR 1971 AP 296.

³⁹ *Kudeepudi Lakshmi v Krishna Vora* AIR 1999 AP 226.

⁴⁰ *Mahuva Biswas v Swagata Biswas* (1998) 4 JT 252.

⁴¹ *Haddon v Haddon* [1887] 18 QB 778. *cf.* *Meenakshi Ammal v PS Muthukrishna* AIR 1961 Mad 380

⁴² *Taylor v Bleach* (1915) 17 Bom LR 56.

ASSESSMENT OF QUANTUM: HAVING REGARD TO THE INCOME AND PROPERTY OF THE RESPONDENT AND THE APPLICANT AND THE CONDUCT OF THE PARTIES AND OTHER CIRCUMSTANCES OF THE CASE

The section lays down that in arriving at the quantum of permanent maintenance, the court must have regard to the respondent's own income and property and the income and property of the applicant and the conduct of the parties and other circumstances of the case and the amount may be such as seems to the court to be just. The section, it will be noticed, leaves the matter to the discretion of the court while stressing that the means of the parties and their conduct and other relevant circumstances of the case are factors which should always be regarded. It would not be helpful to refer to the immense range of decisions of courts in England on the subject or to the decisions of the court in India under the Indian Divorce Act of 1869, or other analogous legislation. Danger lies in phrases used aptly enough in a particular context and opinions useful in their own sphere being treated as riders to the actual statutory language but the principles on which those decisions rest can be of guidance in determining what factors may or may not be taken into account in assessing the amount of permanent maintenance to be awarded under the section, the word 'and other circumstances of the case' were added in sub-s (1) by the Amending Act of 1976, to clarify the intention of the legislature.

In England, it is not unusual to refer to and have regard to what is described as the basis of one-third of the total income of the husband and wife, less the wife's income. The more recent trend, however, is not to lay stress on any such rigid arithmetical rule but have regard to the disposable income of the husband and the income of the wife and assess the amount after taking into consideration all the facts and circumstances of the case, including the conduct of the parties.

The 'one-third' rule had its origin in the practice of ecclesiastical court in fixing permanent alimony while granting divorce *mensa et thoro* (judicial separation) and in numerous instances, the proportion was applied by the court in assessing permanent maintenance to be awarded after a decree of divorce. The supposed arithmetical rule has been critically examined in recent decisions and one summation is:⁴³

43 *Stibee v Stibee* [1931] P 105, 110; *Gilbey v Gilbey* [1927] P 197; *Jagdish v Manjula* AIR 1975 Cal 64.

Although the considerations which applied in Ecclesiastical Courts to awards of alimony must have due weight in determining the proper award of maintenance to a wife after a decree of divorce, the assumption of a fixed arithmetical rule and an indispensable process of applying that rule is erroneous, and disregards the duty imposed by the section under which the ability of the husband and the conduct of the parties are to be considered to find out what is the reasonable amount.

In view of the express provisions of this section, it is not necessary for the court, while determining the amount of permanent alimony or permanent maintenance to a Hindu wife or husband, to look to English matrimonial law. The mode of assessment of the amount of permanent alimony or permanent maintenance is entirely a matter of discretion of the court. A rough working rule may have some usefulness in application for maintenance pendente lite and it is submitted that even if any such working rule is evolved as of some guidance in case of such interim orders, it is neither necessary nor desirable that for assessment of permanent alimony or permanent maintenance there should be any notional or prima facie rule which has regard to arithmetical proportions. The question cannot be arithmetic and must remain entirely of discretion. It would be an error to decide first or even assume what prima facie the proportion should be and then to examine the other relevant factors. The court would take all the circumstances of the case into account and arrive at solution having regard to the means of the parties and their conduct, giving due weight to considerations of good sense and fairness. There can be no set of fixed principles applicable to all the varying types of cases which must fall for consideration under this section and the decision must rest on the facts of each case and the broader ground emphasised in the section and ultimately on the sense of propriety and justice of the court.⁴⁴

The section does not purport to lay down any rigid rule or indicate any yardstick for the purpose nor does it point to any fixed criterion and leaves the matter of assessment to the discretion of the court while stressing that the means of the parties and their conduct are essential factors to which regard must always be had. It has to consider all the pertinent circumstances involving each of the parties. The elements and factors to be considered include everything having a legitimate bearing on present or prospective matters affecting lives of both the parties, which cannot obviously be susceptible of proper enumeration. In the exercise of its discretion, the

44 *Hema v S Lakshmana Bhat* AIR 1986 Ker 130. Reference may also be made to the decisions of the other High Courts referred to in the above case; *Neelam Malhotra v Rajinder Malhotra* AIR 1994 Del 234 (apart from spouse's own earnings, family business income in which husband has a part can be considered for fixing quantum).

court has to select or emphasise such of the factors as are appropriate to the facts of the particular case—in addition to the prime factors which touch the means and conduct of the parties—such for instance as the status and station in life of the parties, duration of the marriage, support and education of children, the ability of the spouses to earn and their future prospects as also their age, health and sex and the reasonable wants of the applicant. In a leading case on the subject of maintenance the Privy Council pointed out, though in a somewhat different context, that maintenance depended upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the parties, a survey of the condition and necessities and rights of the members of the family, the scale and mode of living and the age, habits and wants and class of life of the parties. It is out of a great category of circumstances, any of them small in themselves, that a reasonable induction is to be made by the court in arriving at a fixed sum.⁴⁵

In estimating the amount of permanent alimony or permanent maintenance, the court while dealing with the factor of income, would not focus its attention only on the disposable income of a spouse in the year preceding the making of the order, but would normally have regard to the earning in previous years and probable earnings in the future.⁴⁶ A mode often adopted is to take into account the average of earning during the previous three years. The disposable income would be arrived at after deducting the expenses of earning it. There are other deductions also which the court would take into account. They would include liabilities if any, for income-tax, super-tax and other allied taxes.⁴⁷ The court may, in the exercise of its discretion in ascertaining the 'disposable income', take into consideration contributions to provident fund and insurance premia paid bona fide, having regard to the fact and circumstances of the case.⁴⁸ The support and education of the children of the marriage would be an important item to be taken into account under this head. The court would also have regard to the number of other persons entitled to maintenance from the respondent under the provisions of the Hindu Adoptions and Maintenance Act 1956. In the matter of expenses, the mode of living of the parties while cohabitation or the marriage lasted, may be considered but would not be a reliable index because the past mode of life of the parties may have been on a penurious or miserable scale or on the other hand on an extravagant scale. However, if the scale was suited to the position and status of the parties that may be a factor to be considered in

45 *Ekradeshwari v Homeshwar* AIR 1929 PC 128.

46 *Sherwood v Sherwood* [1929] P 128.

47 *Dayrell-Steyning v Dayrell-Steyning* [1922] P 280, 282; *Stibbe v Stibbe* [1931] P 105, 109–10, *Shewood v Sherwood* [1928] P 215; *J v J* [1955] 2 All ER 617, [1955] P 215; *Lewis v Lewis* [1977] All ER 992, 995.

48 *Sushma v Suresh* AIR 1982 Del 176; *Preeti Archana v Ravinder Kumar* AIR 1979 All 29; *Usha v Sudhir Kumar* (1974) 76 PLR 195.

the estimate where there is no reliable data on the point of income. It would be necessary to consider the overall financial position of the spouses and their necessities, having regard not merely to their income but their property, debts, liabilities⁴⁹ and obligations and other factors to some of which reference has already been made. A reasonable induction would require consideration of various elements and factors that cannot all be listed.

The section speaks of the income and other property of the respondent to the application for maintenance and the conduct of the parties and unlike s 19(2) of the English Matrimonial Causes Act 1950, does not in terms state the 'ability of the husband' as a factor to be taken into consideration. However, it would seem that the court would under the present section take that element also into consideration, as for instance, where it appears that the husband has so arranged his affairs as to show that he has no property at all or very little property and the court may in the particular circumstances of a case, make a strict and stringent order against him.⁵⁰ It would also be open to the court, where the circumstances of the particular case so require, to take into account the earning capacity of the husband as well as the wife.⁵¹ The court has ample discretion and in a deserving case may ascertain not only what moneys the husband had, but what money he could have had if he liked and may take into consideration his capacity and ability to provide maintenance. The court will look at the realities and not permit itself to be misled by appearances.

The mere circumstance that the wife had been living apart for a number of years and was able to earn a living is not sufficient ground for not making an order of maintenance under this section in her favour.⁵² The court will not take into account the fact that the wife is sure to get assistance or even substantial assistance from her brother or other relative, for such help would from its very nature depend on the will of such other person⁵³ and may not by itself be a ground for refusing alimony under this section and the court would take into consideration all the relevant factors, including conduct of the parties and their means.⁵⁴

⁴⁹ Ordinary premiums to be paid on life insurance policy taken out by the husband on his own life would not be treated as deductions, but in respect of policies for other benefits such as for instance, education of children, reasonable amounts of premium would be taken into consideration.

⁵⁰ *Donaldson v Donaldson* [1958] 2 All ER 660 affords an instance of this; *J v J* [1955] 2 All ER 617; *Veena v Avinash* AIR 1984 Del 445.

⁵¹ *Griffith v Griffith* [1957] 1 All ER 494-96.

⁵² *Leela Devi v Manoharlal* AIR 1959 MP 349.

⁵³ *Subramanyam v Saraswathi* AIR 1964 Mys 38.

⁵⁴ *Seshadri v Jayalakshmi* AIR 1963 Mad 283, (1963) 1 MLJ 11

‘CONDUCT OF THE PARTIES’

The means of the parties and their conduct are primary considerations to which the court is directed to address itself in assessing permanent alimony or permanent maintenance to be awarded under the section. Where a matter is contested and evidence led on the issue of maintenance at the hearing of the petition, the court is in a better position to determine the same. Difficulty may arise when an application for maintenance is made after a decree has gone *ex parte* or where at the hearing of the petition the question of maintenance was not determined and in subsequent application the respondent wants to rely on the conduct of the petitioner for the purpose of opposing the same because in such a case the issue as to the matrimonial offence charged and proved against the respondent would be *res judicata*. It has been held in England⁵⁵ that in such a case the husband is barred from asserting matters inconsistent with the decree. Further, he is, for reason of public policy, prohibited from asserting matters (of which he knew) which would reasonably have been expected, if proved, to provide an effective answer to the petitioner or to produce a different result at the trial. This prohibition would probably not extend to matters of which he was ignorant at the time of the trial but which he might have known but for his own carelessness.

There are cases where the earlier conduct of the wife has contributed to the final break-up of the marriage, although such conduct would provide no effective answer to the petition and would not amount to conduct conducing. It would not be just to put such conduct beyond the scope of inquiry. The rights of a wife who has always been selfish and unloving ought not to be identical with those of a wife who has always been loving and unselfish. Where the husband's income leaves available for injured wife only enough to supply the bare necessities of life, the difference may be negligible, but where the husband's means enables the amount to be more generous the court would not allow a bad wife the same amount that it would have otherwise awarded. The court would not take into consideration petty or irrelevant acts, but would keep the matters in issue within reasonable limits. It would seem that the court can take into consideration relevant evidence of the conduct of the parties both before and after the marriage.⁵⁶ The ‘conduct’ is not limited to the instances of conduct contained in sub-s (3), ie, remarriage or being unchaste only but conduct as already described.⁵⁷ If

55 *Duchesne v Duchesne* [1950] 2 All ER 784; *Restall v Restall* [1930] P 189; *J v J* [1955] 2 All ER 617.

56 *Lindsay v Lindsay* [1934] P 162, 166; *Nathulal v Mana Devi* AIR 1971 Raj 208, 211.

57 *Umdesh Chand v Rameshwari Devi* AIR 1982 Raj 83 (dissenting from *Rajinder Parkash v Roshini Devi* AIR 1981 P&H 212). Reference may also be made to notes under ‘Discretion’.

there is non-compliance of the order of maintenance, the court can, in appropriate circumstances, if permissible, even issue directions that the amount of maintenance be deducted from his salary taking into consideration the attendant circumstances. Attention is invited to the undermentioned decision where the husband was working abroad and the court directed that such deduction be made from his salary, if permissible under the law of that country.⁵⁸

‘...MAY BE SECURED, IF NECESSARY, BY A CHARGE...’

An order for permanent alimony or permanent maintenance made by the court does not of itself create any charge upon the property of the respondent whether joint or separate until it is fixed by a decree of the court or agreement of the parties. The right is liable to be defeated by a transfer of the respondent's property to a bona fide purchaser for value without notice of the claim for alimony or maintenance. Section 39 of the Transfer of Property Act 1882 deals with transfer of property in such cases. Where maintenance has been made a charge upon the immovable property of the respondent and the property is subsequently sold, the purchaser must hold it subject to the charge. The present section empowers the court to direct that the gross sum or periodical payment awarded by it for maintenance and support of the applicant shall be charge on the immovable property of the respondent.

AGREEMENT NOT TO SUE FOR MAINTENANCE

On general principles, no agreement between the parties can deprive the court of its right to grant maintenance or to renew the question of maintenance. The rules laid down in this section cannot be overridden by any such arrangement or agreement and the discretion of the court remains unfettered. The question of any such agreement *inter partes* was examined by the House of Lords in the undermentioned case.⁵⁹ It may be noticed that in England there is now some legislation on the subject.⁶⁰ Of course, the court may, in the exercise of its discretion, after taking into consideration all relevant factors hold that such an agreement should not be regarded and that effect should not be given to the same.⁶¹

SUB-SECTION (2): VARIATION OF ORDER

This sub-section confers ample power on the court to vary, modify or discharge any order for permanent alimony or permanent maintenance that

⁵⁸ *Nishat Karimi v Iftekhar Karimi* AIR 2004 Guj 316.

⁵⁹ *Hyman v Hyman* [1929] All ER 245 (HL).

⁶⁰ *Wright v Wright* [1970] 3 All ER 209.

⁶¹ Such for instance, was the result in *Mamji Singh v Sarita Kiran* AIR 1983 P&H 281.

may have been made in any proceeding under the Act under the provisions contained in sub-s (1). In exercising the power, the court would have regard to the 'change in the circumstances of the parties'. There must be some material alteration in the circumstances of the parties and the court would not modify an order simply because there has been some slight alteration in their circumstances. The section does not in terms so state but it would seem that 'conduct' which falls within the meaning of sub-s (1) and which has to be considered for the purpose of that sub-section, may properly be taken into account when an application is made for variation or a rescission of the order.

The law recognises the right of maintenance as a continuing right and the quantum of maintenance may vary from time to time. The court can increase the quantum in view of changed circumstances.⁶²

SUB-SECTION (3)

The court, as already pointed out, has discretion to make an order for permanent alimony or permanent maintenance in favour of a spouse who had been guilty of a matrimonial offence, for instance, adultery. However, the court may vary, modify or rescind any such order if it is satisfied that after the passing of the order the party in whose favour the order was made has not remained chaste and it is open to the court to rescind the order on proof of the fact that such party has had sexual intercourse with any person or has remarried. This applies to both the spouses.

In case of payment of monthly or periodical sums, the court can rescind the order only as regards future payments. As to an order directing payment of a gross sum, it cannot be rescinded under this provision.⁶³

APPEAL

The order awarding or refusing to award alimony and maintenance under this section is appealable.⁶⁴ The appeal being against an order made in exercise of the discretion of the court of first instance the matter is not open to review in the sense that the appeal court can be asked to reassess the evidence and substitute its discretion for that of the court which has passed the order. The position in this class of cases was clearly stated as followed by Asquith LJ in the undermentioned case:⁶⁵

⁶² *Ramshanker Rastogi v Vinay Rastogi* AIR 1991 All 255.

⁶³ *Nanigopal v Renuhala* AIR 1965 Ori 154; *Bllanche Somerset v Bleach* AIR 1915 Bom 50; *Goodhall v Goodhall* AIR 1938 All 121.

⁶⁴ Section 28; *Seshadri v Jayalakshmi* AIR 1963 Mad 283, (1963) 1 Mad LJ 11.

⁶⁵ *Bellenden v Satterthwaite* [1948] 1 All ER 343, 345; *J v J* [1955] 2 All ER 617.

We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions... . It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.

An appeal also lies against any order⁶⁶ made under sub-ss (2) and (3).

When under a compromise decree, permanent alimony is awarded and the compromise is valid, no appeal would lie.⁶⁷

SECOND APPEAL

What should be the quantum of permanent alimony is essentially a question of fact and no second appeal can lie, unless it is shown that the court had misdirected itself or exercised its discretion on a wrong principle. Such, for instance, would be the case if it had failed to take into account any of the relevant factors set out in the section or taken into account extraneous or irrelevant factors.⁶⁸

26. Custody of children.—In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

CUSTODY OF CHILDREN

The jurisdiction of the court to make provision for custody, maintenance and education of minor children under the section depends on the following requisites being fulfilled:

⁶⁶ Section 28.

⁶⁷ *Ajay v Pramula* AIR 1992 All 283.

⁶⁸ *Dharamshi v Bai Saker* AIR 1968 Guj 150, *Umnyaben v Ambalal* AIR 1966 Guj 139; *Sangarewa v Shankarappa* AIR 1992 Kant 211 (reappraisal of evidence permissible in second appeal if the appellate court has misread the evidence).

- (i) The application must be made in any proceedings under the Act; and
- (ii) it must relate to 'minor children'.

The orders contemplated by the section may be made, varied, suspended or revoked from time to time and even after the termination of the proceedings by passing of any decree as if the proceeding were still pending. The decree contemplated in this section is not only a decree granting relief asked for in the petition, but also includes one dismissing a petition.⁶⁹ The court has very wide powers under this section as regards custody of children.⁷⁰

The primary and paramount consideration for the court in making any order under this section would be the welfare of the minor. In petition by a wife in a proceeding for judicial separation for custody of a male child below five years of age, the court would bear in mind the provisions of s 6 of the Hindu Minority and Guardianship Act 1956.⁷¹ The term 'children' in this section would seem to include not only legitimate children but also those deemed to be legitimate by operation of s 16 in case of voidable marriage as also children, the marriage of whose parents was the subject matter of any proceedings under this Act. Although the word 'children' in a statute, *prima facie* means legitimate children, that meaning is displaced in the context in which the word appears in this section and it embraces a wider category than that of legitimate children. In a case decided by the House of Lords,⁷² under s 26(1) of the Matrimonial Causes Act 1950, where the language used is somewhat similar, though not *in pari materia*, it was held that an order for custody of an illegitimate child of the parties born two years prior to their marriage could properly be made under that section. There seems no reason why an order with respect to the custody, maintenance and education of illegitimate minor children of the parties, though not legitimated *per subsequence matrimonial*, in spite of subsequent marriage between them should not be made under the present section. The test of jurisdiction under the present section is the parenthood and not the legitimacy of the child. However, the child with relation to whose custody, maintenance and education an order is made must be a child of the parties to the proceeding under this Act. The case of a child born during marriage, but no child of the husband, would not be covered by this section and it would

⁶⁹ *Permindar Lal v Suman Lata* AIR 1984 HP 1; *Khanindra Das v Kusum* AIR 1991 Gau 54 (husband's petition for divorce dismissed—appeal—wife can pray for custody of children in appeal—see notes under s 28).

⁷⁰ *Ashok Kumar v Sangitabai* AIR 1988 MP 159; *P Madhavan Nair v K Ravindran* AIR 1993 Kant 203 (change in custody after death of mother, covered under this provision).

⁷¹ *Chander Prabha v Prem Nath* AIR 1969 Del 283. Reference may be made to notes under ss 6(a) and 13 of the Hindu Minority and Guardianship Act 1956.

⁷² *Golloway v Golloway* [1955] 3 All ER 429; *Venkata Subbarah v Kamalamma* AIR 1982 AP 369.

seem that the court would have no power to make an order for custody of such child under this section.⁷³

Adoption under Hindu law has the effect of transferring the adopted boy from his natural family into the adoptive family. A son adopted in accordance with the law prior to the commencement of the Hindu Adoptions and Maintenance Act 1956, would be a 'child' of the adoptive parents within the ambit of this section. So also, would the section extend to the case of a minor child, boy or girl, adopted after the commencement of that Act, where the child had become the adopted child of both the parties between whom there was any subsequent proceeding under this Act.

In custody proceedings, the court will take into consideration all the relevant evidence that may be adduced before it and will not exclude any fresh or additional evidence relevant to the matter under consideration simply on the ground that it did not form part of the material on which the issues in the proceedings were determined, for to do so would result in preventing the court from discharging its paramount duty in matters relating to the care and custody of the minor children, namely, to ascertain what directions would best serve the interest of the children themselves.⁷⁴ The welfare of children, being the foremost and paramount consideration, not only can the court rule upon custodial rights, but it can also rule upon and regulate visitation rights.⁷⁵

In a matter relating to custody of a minor, the court would look at the substance of the application and would not be overly concerned with mere technicalities of pleadings.⁷⁶ Income of a parent is not the sole criteria in deciding matters of custody. The welfare of the child assumes primary importance.⁷⁷

A bare reading of the section makes it clear that an order for maintenance can be passed only during the minority of the children and would cease to apply on their attaining majority.⁷⁸

27. Disposal of property.—In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

⁷³ *Webb v Webb* [1952] 1 All ER 527.

⁷⁴ Reference may be made to the general observations on the subject in *Corbett v Corbett* [1953] 2 All ER 69.

⁷⁵ *N Nirmala v Nelson Jeyakumar* AIR 2000 SC 3821.

⁷⁶ *Snehalata v Mahendra Narain* AIR 1980 Raj 64.

⁷⁷ *Rohit Dandekar v Raj Kavitha* AIR 2003 Kant 511.

⁷⁸ *Alka Bhaskar Bakre v Bhaskar Bakre* AIR 1991 Bom 164.

The rule laid down in this section is intended to prevent multiplicity of litigation in respect of certain property between parties to any proceeding under the Act by laying down in effect, that an application with respect to any property presented at or about the time of marriage to both the husband and the wife may be made by either party to such proceeding and that the court may in the exercise of its discretion make provision for disposal of such property as it deems just and proper. The application must be made before the proceeding terminates and the order may be made at the time of passing of the decree or liberty may be reserved to the parties to apply for an order for disposal of such property in the proceeding on any subsequent date. The operation of rule is confined only to property presented to the parties at or about the time of marriage and which belongs jointly to them⁷⁹ and does not extend to articles of dowry given to and exclusively owned by the wife.⁸⁰ When the property is in the joint names of the spouses, an equitable distribution is imminent.⁸¹ Other disputes relating to any property between the parties must be the subject matter of ordinary legal proceedings and cannot be entertained by the Matrimonial Court (District Court), constituted under the Act. In the undermentioned case the view, however, has been expressed that in proceeding under the Act the court has inherent power to pass an appropriate decree about property which may belong solely to the husband or to the wife.⁸² In the absence of statutory authority, the court trying matrimonial causes has no jurisdiction to deal with the property rights of the parties or to dispose off any property jointly owned by them or owned separately by either of them. The views expressed by the High Courts of Allahabad, Jammu and Kashmir and Delhi have been dissented from by the Bombay High Court.⁸³ The court has held that it would be improper to restrict the section to property received by the spouses jointly and the view has been expressed that undivided and collective gifts received during the time of marriage are also covered.

The decision of the Bombay High Court in the case of *Sangeeta v Balkrishna*, *supra* was carried in appeal before the Supreme Court. Partly

79 *Mahalaxmiamma v Radhakrishna Rao* AIR 1968 Mys 229; *Subhashlata v N Khanna* AIR 1992 Del 14.

80 *Vinod Kumar v State of Punjab* AIR 1982 P&H 372; *Pratibha Rani v Suraj Kumar* AIR 1985 SC 628.

81 *Sunita Sallvi v Shankar Salvi* AIR 2003 Bom 431.

82 *Kamta Prasad v Om Wati* AIR 1972 All 153 (wife's ornaments). In *Sardar Surinder Singh v Manja Kaur* AIR 1983 J&K 68 the contrary view, it is submitted, has rightly been taken; *Shukla v Brij Bhushan* AIR 1982 Del 223 (individual property of the spouses does not come within jurisdiction of the matrimonial court under this section); *Surinder Kaur v Madan Gopal Singh* AIR 1980 P&H 334 (dissent was expressed); *Sangeeta v Balkrishna* AIR 1994 Bom 1 (court has inherent powers to pass orders for disposal of property which is not covered within this section); *Nirmala Gupta v Ravendra Kumar* AIR 1996 MP 227.

83 *Nandani v Sanju* AIR 1988 Bom 239; *Shakuntala v Mahesh* AIR 1989 Bom 353 followed.

overruling the decision, it was held that the expression 'at or about the time of marriage' had to be interpreted as meaning property relatable to the marriage which could include property given at the time of marriage or even before or after it, and such property would be their joint property. Such property could be dealt with under the section.⁸⁴ Rejection of such an application is thus not proper.⁸⁵ In a recent decision the High Court of Allahabad has held that such property would also include property not belonging jointly to the parties, subject to the qualification that such property was presented at or about the time of marriage and the courts jurisdiction to deal with such property is not restricted, a view has been expressed that the exclusive properties of the parties can also be dealt with.⁸⁶ The Orissa High Court has also dissented from the view expressed by the Allahabad High Court and has held that the section cannot be stretched to mean that the individual property (*stridhana*) of the wife is covered under this section,⁸⁷ the court has expressed the view that such an anomaly should be removed by the legislature. There is nothing in the section to suggest that the concept of *stridhana* property of a woman has been completely abolished. There can result a criminal offence by the husband in respect of 'entrustment' by the wife of her *stridhana* property to the husband. The section merely provides for an alternative remedy.⁸⁸ Though, as mentioned earlier, the section contemplates that an order under the section must be made in the decree, in the undermentioned case, it has been held that an order passed on an application under this section after the decree would not render it illegal.⁸⁹

The court can pass appropriate order regarding joint property under this section. A spouse can be restrained from dealing with joint property during the pendency of any proceeding under this Act.⁹⁰ The Bombay High Court has held that the section cannot deal with property acquired by the spouses by their joint efforts and is restricted to property presented at or about the time of marriage.⁹¹ There is thus, a divergence of views on the scope and ambit of this section as regard the jurisdiction of the court and the extent to which the court can pass orders under this section. It is submitted that the section needs to be much more clearly stated, in order to remove the difficulties as are evident from various pronouncements, and more particularly

84 *Balkrishna v Sangeeta* AIR 1997 SC 3562.

85 *Sangita v Sanjay Bansal* AIR 2001 Del 267.

86 *Hemant Kumar v Laxmi Devi* AIR 2004 All 126.

87 *Maharajan v Sarojini* AIR 1988 Ori 175.

88 *Pratibha Rani v Suraj Kumar* AIR 1985 SC 628.

89 *Bijoy Krishna Ghoshal v Namita Ghoshal* AIR 1991 Cal 34.

90 *Braj Kishore v Rekha* AIR 1992 Pat 173.

91 *Kamalakar Sambhus v Tejas Sambhus* AIR 2004 Bom 478.

with a view to avoid multiplicity of proceedings, by comprehensively dealing with the issue.

28. Appeals from decrees and orders.—(1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of ninety days from the decree or order.

AMENDMENT

This section was substituted as above by the Amending Act of 1976. Before the amendment it was as under:

28. Appeal from decrees and orders.—All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of the original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force:

This section was further amended on the 23rd December 2003, whereby the period of 30 days was substituted for 90 days.

The amendment is retrospective in its operation. An interim order under s 24 is not appealable even if an appeal against the same was pending when the amendment came on the statute book. A pending appeal is a pending proceeding and therefore, no appeal is maintainable in case of any such interim order.⁹² An appeal and not a revision lies against decree passed by the court of small causes deciding a petition while acting as district court [s 3(b)]. Reference may be made to the undermentioned case.⁹³ Appeals

⁹² *Rajpal v Dharmanati* AIR 1980 Raj 102; *Sunil Gupta v Payal* AIR 1991 Bom 423.

⁹³ *Chandra Swarup v Manorama Sinha* AIR 1981 All 230.

from decrees under this Act are to be registered as miscellaneous appeals and not as first appeals, however such appeals are required to be treated as ordinary first appeals under s 96 of the Code of Civil Procedure 1908.⁹⁴

APPEALS

The section lays down that:

- (i) Decrees in all proceeding under the Act are appealable.
- (ii) Orders made under ss 25 and 26 are appealable.
- (iii) Interim orders (for instance, an order for maintenance pendente lite) are non-appealable.
- (iv) Orders only for costs are not appealable.
- (v) An appeal against any decree or order must be filed within 90 days of the decree or order.

In *Sipra Dey v Ajit Kumar Dey*,⁹⁵ it has been held that the provisions of the Limitation Act 1963 apply to matrimonial appeal under this section, notwithstanding the words under proceedings in s 29(3) of the Limitation Act 1963.

Questions sometimes arise as to the effect of the death of a respondent, pending an appeal filed in any case under the Act. Reference may be made to the cases noted below.⁹⁶

A party in whose favour the ultimate result of the case has gone is not bound by any adverse finding against him in the judgment and cannot appeal against the same.⁹⁷

JUDGMENT IN REM

A judgment given by a competent court in exercise of matrimonial jurisdiction conferred under this Act and determining the status of the parties falls within the purview of s 41 of the Indian Evidence Act 1872 and would be conclusive not only against the parties to the proceeding but against the whole world. It would operate as judgment *in rem*.⁹⁸

SUB-SECTION (1)

This sub-section makes definite provision for appeals against all decrees.

⁹⁴ *Lipika Gupta v State of Bihar* AIR 2001 Pat 39.

⁹⁵ AIR 1988 Cal 28.

⁹⁶ *Subas Pande v Manohar Pande* AIR 1971 Bom 183; *Sunanda v Subba Rao* AIR 1957 AP 424; *Kamalbai v Ramadas* AIR 1981 Bom 187.

⁹⁷ *Tara Singh v Shankuntala* AIR 1974 Raj 21.

⁹⁸ *Siddaiah v Penchalamma* AIR 1963 AP 158; *Subas Pande v Manohar Pande* AIR 1971 Bom 183; *Sundanda v v Subba Rao* AIR 1957 AP 424.

SUB-SECTION (2)

Before the amendment of the section in 1976, there was a difference of opinion among various High Courts as to the appealability of orders made in pursuance of provisions contained in the Act, in respect of maintenance pendente lite, expenses of the proceeding started under the Act, permanent alimony, maintenance and custody of children as will be seen from the decisions noted below.⁹⁹ The section was not happily worded. Sub-section (2) now makes the position absolutely clear. As per the amended section, no appeal lies against interim orders passed under ss 24–26.¹

In *Gurbaksh Singh v Taran Jit*,² it has been held that an appeal against an order granting maintenance pendente lite is not appealable, even though an appeal had been filed against the same before the Amending Act of 1976 was enacted. It was so held relying on s 39 of the Amendment Act of 1976. It was held that the appeal, though pending, had become non-maintainable. It has also been held that no appeal lies from an order under s 24, even though the application had been pending when the section was amended.³

The court may, during pendency of a proceeding under the Act and at the hearing, make many orders for which provisions are made in the Code of Civil Procedure 1908. Orders not passed ‘under the Act’ but passed under

99 *Sobhana Sen v Amar Kanta Sen* AIR 1959 Cal 455 (order under s 24); contra *Gopendra Nath v Prativa Rani* AIR 1962 Cal 455; *Seshadri v Jayalakshmi* AIR 1963 Mad 283 (order under s 25); *Harilal v Lilavati* AIR 1961 Guj 202 (order under s 25); *Lallu Bhai v Nirmalaben* AIR 1972 Guj 174; *Rukhmanibai v Kishanlal* AIR 1959 MP 187; *Sarla Devi v Balwan Singh* AIR 1969 All 601; *Snehalata v Jagadish* AIR 1964 Ori 122 (order under s 24); *Jairath v Jairath* AIR 1967 Punj 148 (order refusing stay); *Sunder Singh v Manna Sunder Singh* AIR 1962 Punj 127; *Tarlochan Singh v Mohinder Kaur* AIR 1961 Punj 508 (order under s 24); *Govind Ram v Lila Devi* AIR 1969 Raj 253 (orders under ss 24–26; *Darshan Singh v Daro* AIR 1980 Raj 102; *Harulal v Saudamini Misra* AIR 1985 Ori 239; *Kutumba Rao v Sesharatnammba* AIR 1967 AP 323 (FB) (s 24); *Subra Bagchi v PK Bagchi* AIR 1975 J&K 83 (FB); *Santosh Kumari v Chaman Lal* AIR 1978 J&K 46; *Parashburam v Pratibha* AIR 1975 Kant 31; *Madhukar v Malti* AIR 1973 Bom 141; *Suresh Prasad v Monarama* AIR 1973 Pat 321; *Mira Bose v Santosh Kumar* AIR 1973 Cal 483; *Gurbachan Kaur v Swaran Singh* AIR 1978 All 255; *Udai Narain v Kusum* AIR 1975 All 94; *Satish Bindra v Surjit Singh* (1977) 79 P LR 384; *Prithvirajsinghji v Shivprabhakumari* AIR 1960 Bom 164; *Mohan Rani v Mohanlal* AIR 1965 J&K 88; *Muniswamappa v Eramma* AIR 1968 Mys 8; *Sushiladevi v Dahani Ram* AIR 1965 HP 12; *Taranjit v Gurbaksh Singh* (1975) ILR HP 663; *Bankim Chandra v Anjali* AIR 1972 Pat 80.

1 *Sunil Gupta v Payal* AIR 1991 Bom 423.

2 AIR 1977 HP 66.

3 *Narain Singh v Rukmani* AIR 1977 HP 93; *Priti Parihar v Kailash Singh* (1977) Raj LW 372 (not appealable); *Satish Bindra v Surjit Singh Bindra* (1977) 79 PLR 384 (right taken away). The High Court may, however, treat such an appeal as a revision.

the Code of Civil Procedure 1908, do not become appealable under the present section.⁴ The words—‘under any law for the time being in force’ relate not only to the forum before which the appeal is to be preferred and the procedure in connection with such appeal but also the jurisdiction and power of the court in dealing with the appeal so filed. Thus a right of second appeal is limited to the grounds set out in s 100 of the Code of Civil Procedure 1908 and the court will have jurisdiction only on questions of law and not on questions of fact.⁵

As regards appeal against an order in counterclaim under s 23A for maintenance, reference may be made to the under-mentioned case.⁶

LETTERS PATENT APPEAL

It has been held in the under-mentioned cases that an appeal under the letters patent of the High Court is maintainable against an order of a single judge of the High Court passed in appeal against an order made on a petition under the Act. The extent and scope of the inquiry by the Appellate Bench in such letters patent appeal has also been considered in those cases.⁷

FORUM OF APPEAL

Where in a petition under the Act a decree is passed by the court of the Civil Judge, Senior Division, which court was notified by the state government under s 3(b), as having jurisdiction in respect of matters dealt within the Act, the appeal, according to the Bombay High Court, lies to the district court and not the High Court.⁸ Similar in effect are decisions of the Madras,⁹ Mysore,¹⁰ Orissa High Courts¹¹ and Gujarat High Court.¹² Where there is no such notification specifying any other civil court as a District Court and the

4 *Anita v Birendra* AIR 1962 Cal 88 (order for stay proceedings), 65 CWN 786; *Udai Narain v Kusum* AIR 1975 All 94 (amendment of petition by adding correspondents); *Dhani Ram v Sushila* AIR 1977 HP 83 (order for stay).

5 *UmIyabehen v Ambalal* AIR 1966 Guj 139.

6 *Jayanti v Kunjabehari* AIR 1987 Ori 184; *Krishna Khetrapal v Satish Lal* AIR 1987 P&H 191 (appeal against consent decree under s 13B); *Pushpa Dutt Mishra v Archana Mishra* AIR 1992 MP 260 (appeal maintainable in case of return of plaint for presentation to proper court).

7 *Dassi v Dhani Ram* AIR 1969 P&H 25; *Vira Reddi v Kistamma* AIR 1969 Mad 235; *Ramji Singh v Chhulghana Kuer* AIR 1958 Pat 655 (FB); *Ambujam v TS Ramaswamy* AIR 1973 Del 46; *Atma Ram v Kala Wati* AIR 1982 P&H 83 (FB).

8 *Gangadhar v Manjula* AIR 1960 Bom 42.

9 *Valliammal v Praswamy* AIR 1959 Mad 510, (1959) 2 MLJ 152 (to that court to which appeal generally lies); *Ammal v Vanniar* (1959) Mad 969.

10 *Mallappa v Mallava* AIR 1960 Mys 292, *Dhulappa v Krishnabai* AIR 1962 Mys 172.

11 *Nursingh Charan v Hemant Kumari* AIR 1978 Ori 163, *Madhuri v Madhukar* AIR 1984 Bom 239.

12 *Ambi Pundalik v Pandalik* AIR 1960 Bom 521, 61 Bom LR 1167.

petition is decided by the Additional District Judge who is part and parcel of the District Court, the appeal lies to the High Court and not the District Court. In Punjab, having regard to the provisions of the Punjab Courts Acts, it has been held that in the case of a petition decided by a subordinate judge, first class, empowered by notification to entertain the same, the appeal lies to the High Court and not to the District Court.¹³ A Full Bench of the Allahabad High Court has held that in a proceeding commenced on a petition under the Act, which petition does no mention any value on the face of it, an appeal from an order under s 24 by a civil judge, who is a District Court within the meaning of the Act, lies to the High Court and not to the District Court.¹⁴ The valuation of the petition would be a relevant factor in determining the appellate jurisdiction.¹⁵

PETITION, SUIT, DECREES

Though the proceedings under ss 9–13 are initiated by petition, they are in substance suits and orders passed, granting or refusing reliefs in any such matter are decrees. Moreover, the rule made by the various High Courts under the Act are also to the same effect. Question, however, has at times arisen as to court-fee in respect of an appeal, as may be seen from the undermentioned cases.¹⁶

SUB-SECTION (4), LIMITATION

Sub-s (4) expressly provided that every appeal shall be filed within a period of 30 days from the decree or order. An appeal arising from any proceedings pending at the date of commencement of the Amending Act of 1976, would be governed by this sub-section.¹⁷ By the Amending Act of 2003, the period has been enhanced to 90 days. Looking to the fact that in proceedings of matrimonial disputes the period of limitation for filing of an appeal was inadequate, the Supreme Court had recommended that such period should be enhanced to 90 days.¹⁸ The legislature has now amended the section.

13 *Kalyan Singh v Tej Kaur* AIR 1961 Punj 480, (1961) 1 Punj 303 .

14 *Paras Ram v Janki Bai* AIR 1961 All 395 (FB); cf *Ranjibhai v Shantaben* AIR 1984 Guj 167; *Chhagan Karsan v Bhagwanji Punja* AIR 1973 Guj 165. As to appeal from a decision of the Small Causes Court Judge, reference may be made to *Dal Chand v Swarn Pratap* AIR 1965 All 46; *Chandra Swaroop v Manorama* AIR 1981 All 230, overruling *Shesh Narain v Savita* AIR 1967 All 156.

15 *Shalu Sharma v Ajay Sharma* AIR 2003, All 18.

16 *Ram Kumari v Meenaketan* AIR 1976 Ori 32; contra *Antala Gope v Sabo Gopain* AIR 1962 Pat 489.

17 *Debi Bhaduri v Kumarjib Bhaduri* AIR 1980 Cal 1 (FB); *Raj Bala v Pramod Kumar* (1979) 81 PLR 71; *Chandra Dev v Rani Bala* AIR 1979 Del 22; *Kumarath Yasoda v Manathanath Narayanam* AIR 1985 Ker 220 (FB).

18 *Savitri Pandey v Prem Chandra Pandey* AIR 2002 SC 591.

However, delay in filing any such appeal may be condoned under s 5 of the Limitation Act 1963.¹⁹ The provisions of the Limitation Act 1963 are not thus, excluded by this section.²⁰ Delay, however, would not be condoned simply on the ground that the appellant had not obtained a copy of the decree in time [s 23(4)], not having asked for the same.²¹ In relation to a second marriage, during the pendency of an appeal, the question is no longer *res integra* in view of the decision of the Supreme Court in *Lata Kamat v Vilas*, supra. On the question of delay in institution of the appeal, the High Court of Kerala had taken the view that if there is a delay in institution of the appeal, and the other spouse remarried in the *interagnum*, if the delay was condoned, it would not have any bearing on the appeal.²² The Andhra Pradesh High Court has disagreed with the above view.²³ It may be stated that when the provisions of the Limitation Act 1963 are not excluded by this section, s 5 of that Act being applicable, the effect of condonation would be that the appeal would be treated as having been filed within the period of limitation.

The period of limitation for filing a second appeal under s 100 of the Code of Civil Procedure 1908 would be 90 days and not 30 days since sub-s (4) would not apply in case of such appeal.²⁴

INTERFERENCE BY APPELLATE COURT

Where a case turns entirely on questions of fact and the credibility of witnesses, a court of appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony of conflicting witnesses whom he has seen and heard and a heavy burden is thrown upon the unsuccessful litigant who seeks to reverse the decision.²⁵ On the other hand, where the findings as regards facts have been drawn from argumentative inferences from the testimony—oral and documentary, and depend upon the weight of evidence and the inherent probability of the story and not on credibility induced by witness by the demeanour or manner in which they answer questions, the trial court is in no better position than the court of appeal in discovering the truth.²⁶ These general principles are well-established. In a case decided under the Indian Divorce Act 1869, the Supreme Court observed:²⁷

19 *Kantibai v Kamal Singh* AIR 1978 MP 245; *Debi Bhaduri v Kumarjib Bhaduri* AIR 1980 Cal 1 (FB); *SV Subasini Devi v Padmanabhan Madhavan* AIR 1989 Ker 314. *Ratan Malla v Sefali Malla* AIR 2004 Gau 36.

20 *Lata Kamat v Vilas* AIR 1989 SC 1477.

21 *Surjit Kaur v Tarsem Singh* AIR 1978 P&H 209.

22 *SV Subasini Devi v Padmanabhan Madhavan* AIR 1989 Ker 314.

23 *Lokeshwari v Srinivasa Rao* AIR 2000 AP 451 (on the facts of the case, delay not condoned).

24 *Indraj v Shanti* AIR 1978 All 279.

25 *Sitalakshmi v Venkata Subbrahmanian* (1930) 32 Bom LR 887 (PC).

26 *Virappa Chettiar v Perikaruppan* (1915) 17 Bom LR 608 (PC); *Simpson v Simpson* [1951] 1 All ER 955 (CA); *Radha Prasad v Gajadhar Singh* AIR 1960 SC 115.

27 *White v White* AIR 1958 SC 441.

If in giving the findings the courts ignore certain important pieces of evidence and other pieces of evidence which are equally important are shown to have been misread and misconstrued and this court comes to the conclusion that on the evidence taken as a whole no tribunal could properly as a matter of legitimate inference arrive at the conclusion that it has, interference by this court will be called for.

In respect of order passed by the court of first instance in matters where it exercises discretion the court of appeal is very slow to interfere and is guided by somewhat different considerations.

28A. Enforcement of decrees and orders.—All decrees and orders made by the court in any proceedings under this Act shall be enforced in the like manner as the decrees and orders of the court made in exercise of its original civil jurisdiction for the time being are enforced.

This section was substituted by the Amending Act of 1976. The section is self-explanatory and states that the decrees and orders made by a court under the Act are enforceable as decrees passed by the court in exercise of its original civil jurisdiction.

The section provides the procedure for enforcement of decrees. An order under s 24 can be enforced as a money decree.²⁸

CHAPTER VI

SAVINGS AND REPEALS

29. Savings.—(1) A marriage solemnised between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes²⁹ or sub-divisions of the same caste.

(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnised before or after commencement of this Act.

²⁸ *Shanti Devi v Goutnd Singh* AIR 1983 Raj 211, 220.

²⁹ *Kastoori Devi v Chitranji Lal* AIR 1960 All 446.

(3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.

(4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act 1954 (43 of 1954) with respect to marriages between Hindus solemnised under that Act, whether before or after the commencement of this Act.

SAVINGS

A saving clause is generally inserted where there is repeal of any statute and re-enactment of the law on the subject and also inserted at time when it is deemed necessary to except something from the operation of the Act which would otherwise have been included. At times, saving clauses are inserted to prevent the effect of certain repeals, wholly or in part. Savings are also inserted at times *ex majore cautela*.³⁰ Saving clauses are seldom used to construe the Act.³¹

SUB-SECTION (1)

The validity of a Hindu marriage solemnised after the coming into operation of this Act is to be judged by the relevant provisions of the Act. The validity of a marriage solemnised, between Hindus before this Act came into operation has to be judged by the law as it previously existed. The Hindu Marriage Disabilities Removal Act 1946, laid down:

Notwithstanding any text, rule or interpretation of the Hindu Law of any custom or usage, a marriage between Hindu which is otherwise valid, shall not be invalid by reason only of the fact that the parties thereto: (a) belong to the same *gotra* or *pravara*; or (b) belonging to different sub-division of the same caste.

The Hindu Marriages Validity Act 1949, went a step further and laid down:

Notwithstanding anything contained in any other law for the time being in force or in any text, rule or interpretation of Hindu or in any custom or usage, no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the facts that the parties thereto belonged to different religions, castes, sub-castes or sects.

30 *Smith v R* [1898] AC 782; *MoLaughlin v Westgarth* (1906) 75 LJ PC 117; *Shah Bhojraj Oil Mills v Subhash Chandra* AIR 1961 SC 1590, 1600.

31 *Shah Bhojraj Oil Mills* supra

Both these enactments are repealed by s 30 and effect is given to the rules laid down in them by this saving contained in sub-s (1). Any marriage solemnised between Hindus if otherwise valid, is not to be invalid or deemed ever to have been invalid on any of the grounds mentioned in it.

SUB-SECTION (2)

Divorce was not known to the general Hindu law but then in certain communities, divorce was recognised by custom and the courts upheld such custom when it was not opposed to public policy.³² The scheme and object of the present Act is not to override any such customs, which recognised divorce, and effect is given to the same by the saving contained in this sub-section. It is not necessary for parties in any such case to go to the court to obtain divorce on ground recognised by custom. The custom must, of course, be a valid custom.³³ There exists a custom among the Sikh Jats of Amritsar district, under which a husband can dissolve his marriage even otherwise than under the provisions of the present Act.³⁴ When the material on record does not show the existence of a custom of divorce on the basis of which the purported deed of divorce is entered into and custom has not even been pleaded, divorce cannot be granted on the basis of custom.³⁵

Although divorce was not known to the general Hindu law, in many states, divorce was allowed on certain grounds as the result of special legislation on the subject. Some of those enactments permitting divorce were repealed by s 30 in view of the comprehensive nature of the present Act. Proceedings pending under any of those enactments at the commencement of this Act are expressly saved by sub-s (3).

There are, however, some special enactments permitting divorce on stated grounds which are not repealed by this Act and the object of the present sub-section is not to override them but to permit them from continuing in force. Any right conferred by the provisions of any such unrepealed special enactment is saved by sub-s (2) and can be availed of by persons to whom they apply, whether the marriage was solemnised before or after the commencement of this Act. A suit for divorce under any such unrepealed enactment would not come within the purview of the present Act and s 19 of the Act dealing with jurisdiction has no application to the same.³⁶ Thus, for instance, the right to obtain dissolution of marriage

³² See s 441, and notes thereunder (Vol 1); *PL Singh v MM Singh* AIR 1956 Mani 18; *Madho Prasad v Shankuntala* AIR 1972 All 119; *Edamma v Hussainappa* AIR 1965 AP 455; *Sudarshan Kaur v Manmohan Singh* AIR 1978 P&H 115.

³³ *Anandi Devi v Rajaram* AIR 1973 Raj 94 (husband tearing a piece from his turban, not valid custom).

³⁴ *Balvinder Singh v Gurbal Kaur* AIR 1985 Del 14.

³⁵ *Yamnaji Jadhav v Nirmala* AIR 2002 SC 971.

³⁶ *Kamala Nair v Narayanan Nair* AIR 1958 Bom 12; *Vasappan v Sarada* AIR 1958 Ker 39.

on any of the grounds stated in the Travancore Nayar Act (which had not been repealed) in the court of the munsif, having jurisdiction under that Act remains unaffected by the present Act by reason of this sub-section. The sub-section, as pointed out by a Full Bench of the Kerala High Court, saves the right to obtain dissolution under the Nayar Act and everything necessary, substantial, remedial or procedural to obtain dissolution of marriage under the enactment.³⁷ Similar is the position under the Madras Aliyasanthana Act 9 of 1949³⁸ and the Cochin Nair Act.³⁹ Grounds of dissolution of a marriage under s 6(a) of the Madras Marumakkathayam Act are saved.⁴⁰

The saving of any right recognised by custom or conferred by any special enactment does not mean that the rights conferred by the present Act are unavailable to a party.⁴¹ In view of the saving of customary divorce, a finding that no such divorce can take place after the coming into force of this Act cannot enure.⁴²

In a proceeding adopted after the coming into operation of this Act, it would not be open to a party to rely on any ground for relief recognised under a repealed enactment and the matter would be governed by the provision of this Act.⁴³ Reference may also be made to the undermentioned case.⁴⁴

SUB-SECTION (3)

Section 30 repealed a number of special enactments under which marriage could be annulled or divorce granted. Proceeding adopted by parties under any of those enactments and pending at the date of the commencement of the present Act are expressly saved by this sub-section. Such proceedings may be continued and determined as if this Act had not been passed. The saving in this sub-section only applies to proceeding pending at the commencement of this Act and not to any proceeding adopted after this Act came into operation.

As to proceedings for restitution of conjugal rights pending at the commencement of this Act, see notes under s 9.

37 *Krishna Pillai v Subhadra Amma* AIR 1971 Ker 44 (FB); *Ayyappa v Parukutti Amma* (1970) KLT 442 (FB); *Madhavikutty v Bhasker* AIR 1976 Ker 71. The Travancore Act was subsequently repealed: *G Madhavan Nair v S Radhamony* AIR 1979 Ker 152; *Madhavasen Nair v Radhamony* (1979) KLT 61.

38 *Prema v Ananda Shetty* AIR 1973 Mys 69.

39 *Leela v Radhakrishnan* (1977) KLT 899. Similar is the position under the Travancore Ezhava Act 1100.

40 *Saraswathy Amma v Padmavati* AIR 1993 Ker 198.

41 *Chellappan Nair v Madhavi Amma* AIR 1961 Ker 311 (FB), (1961) 1 Ker 33 (FB).

42 *P Mariammal v Padmanabhan* AIR 2001 Mad 350.

43 *Sitabai v Ramchandra* AIR 1958 Bom 116 (FB).

44 *Gopal Krishnan v R Sarasamma* AIR 1980 Ker 109 (pendency of petition for dissolution of marriage under Travancore Nair Act).

SUB-SECTION (4)

Sub-section 4 of this Act has overriding effect and any statute in force immediately before the commencement of this Act ceases to have effect in so far as it is inconsistent with any of the provisions contained in this Act. In order to leave no scope for any doubt and out of abundant caution, the legislature has, by the saving contained in this sub-section, expressly stated that the Special Marriage Act 1954, continues to operate with respect to marriage between Hindus solemnised under that Act and nothing contained in this Act is to affect the provisions of that enactment. This sub-section does not, however, mean that the present Act would not apply in case one party to a marriage under this Act subsequently enters into a marriage with another person under the Special Marriage Act 1954.

30. Repeals.—Repealed by the Repealing and Amending Act 1960 (58 of 1960), s 2 and First Schedule.

The section, prior to its amendment, was as follows:

30. Repeals.—The Hindu Marriage Disabilities Removal Act 1946 (XXVIII of 1946), the Hindu Marriages Validity Act 1949 (XXI of 1949), the Bombay Prevention of Hindu Bigamous Marriages Act 1946 (Bombay Act XXV of 1946), the Bombay Hindu Divorce Act 1947 (Bombay Act XXII of 1947), the Madras Hindu (Bigamy Prevention and Divorce) Act 1949 (Madras Act VI of 1949), the Saurashtra Prevention of Hindu Bigamous Marriages Act 1950 (Saurashtra Act V of 1950) and the Saurashtra Hindu Divorce Act 1952 (Saurashtra Act XXX of 1952) are hereby repealed.

ENACTMENTS REPEALED

This section enumerated certain enactments relating to the law of marriage and divorce which are now repealed. Although divorce was not known to the general Hindu Law, in many states, divorce was allowed on certain grounds as result of special legislation and, monogamy was enforced. In view of the comprehensive nature of the present Act, some of those enactments were repealed as there was no necessity of having those enactments on the statute-book.

Generally speaking, the effect of a repeal without saving would be to obliterate the repealed enactment from the statute-book as completely as if it had never been passed. Reference may be made to notes under s 29 above and s 6 of the General Clauses Act 1897, which deals with effect of repeal.⁴⁵ The repeal of s 30 has not made any change in the legal position as it abided under the repealed section.

⁴⁵ *Sitabai v Ramchandra* AIR 1958 Bom 116 (FB).

THE HINDU SUCCESSION ACT 1956

PRELIMINARY

1. Short title and extent	292
2. Application of Act	293
3. Definitions and interpretations	295
4. Overriding effect of Act	299

INTESTATE SUCCESSION

5. Act not to apply to certain properties	306
6. Devolution of interest in coparcenary property	308
7. Devolution of interest in the property of a tarwad, tavazhi kutumba, kavaru or illom	324
8. General rules of succession in the case of males	330
9. Order of succession among heirs in the Schedule	357
10. Distribution of property among heirs in Class I of the Schedule	359
11. Distribution of property among heirs in Class II of the Schedule	363
12. Order of succession among agnates and cognates	365
13. Computation of degrees	365
14. Property of a female Hindu to be her absolute property	377
15. General rules of succession in the case of female Hindus	406
16. Order of succession and manner of distribution among heirs of a female Hindu	429
17. Special provisions respecting persons governed by marumakkattayam and aliyasantana laws	432

GENERAL PROVISIONS RELATING TO SUCCESSION

18. Full-blood preferred to half-blood	439
19. Mode of succession of two or more heirs	442
20. Right of child in womb	443
21. Presumption in cases of simultaneous deaths	444
22. Preferential right to acquire property in certain cases	446
23. Special provisions respecting dwelling houses	449
24. Certain widows re-marrying may not inherit as widows	454

25. Murderer disqualified 456

26. Convert's descendants disqualified 458

27. Succession when heir disqualified 459

28. Disease, defect, etc. not to disqualify 460

ESCHEAT

29. Failure of heirs 460

TESTAMENTARY SUCCESSION

30. Testamentary succession 468

REPEALS

31. Repeals 470

THE SCHEDULE

Heirs in Class I and Class II 471

INTRODUCTORY NOTE



The law of inheritance comprises rules which govern devolution of property on the death of a person, upon other persons solely on account of their relationship to the former. In Hindu law, the joint family system comes first in historical order. The law of inheritance was of later growth and, in general, applied only to property held in absolute severalty as distinguished from property held by the joint family. The joint and undivided Hindu family is the normal condition of Hindu society. The fundamental conception of the Hindu joint family is a common male ancestor, with his lineal descendants in the male line. So long as the family is in its normal condition, that is, its undivided state, it forms a corporate unit, though not a juridical person. The joint family traces its origin to the ancient patriarchal system, and the transition from that system to the joint family was natural and logical development. In the joint family also, the *paterfamilias* was the unquestioned ruler and the authority of the father of the family and some of his exclusive privileges are even now traceable in the rights of the father as the *karta* of the joint family, though the principle of *Patria potestas* has long ceased to be recognised. The earlier concept of the joint family was somewhat analogous to that of a corporate body and the tendency was to sink the individual in the family. Social conditions, however, underwent considerable transformation and there grew a body of rules of inheritance under the title *Dayavibhaga* which as explained by Vijnaneshwara means division of property, which becomes the property of another solely by reason of his relation to the owner. Even under early Hindu law, rights of sons (as junior members of the family) were recognised and they acquired equal interest with the father in the ancestral property as coparceners. Partition was an inevitable corollary of this system of coparcenary. In addition, even in case of such a corporate unit, self-acquisitions, though at first viewed askance, had to be recognised and rules of inheritance had to be laid down.

The law of heirship had close connection with the doctrine—‘He who inherits the property, also offers the *pinda*’.¹ It was based upon the principle

1 Vishnu XI, 40: *Yascharthaharah sapinda-dayi*.

of consanguinity. The theory of spiritual benefit was a later development. In most cases spiritual efficacy, propinquity and natural love and affection ran along the same lines. However, difficulties arose when these ran in diverse lines and schemes of inheritance with some radical differences came into existence in different parts of the country. The difference in the law of inheritance between the two systems of Mitakshara and Dayabhaga, the existence of a number of schools of Hindu law, the matriarchal system prevailing in some southern parts of the country and dissimilar local and family customs obviously could not embrace a whole genus of cases and it was not possible to expect a system which was a homogeneous and consecutive whole. Besides, a number of anomalies and some inequitable rules of succession had come into existence due to historical reasons and in some cases, due to the conservatism of judicial interpreters. Moreover conflicting pronouncements of courts based at times on variant readings of the ancient texts had resulted in congeries of decisions. In case of some of which, it was difficult to extract the ratio decidendi and not possible to harmonise them with the rest.

In this connection, it may also be mentioned that *stridhana* (woman's property) had become by far, the most complicated and difficult branch of the law of succession. The difficulty of the subject may be gauged from what Jimuta Vahana stated in Dayabhaga after finishing his discourse on *stridhana*: 'Thus has been explained the most difficult subject of succession to a childless woman'. It can be seen from the foregoing chapters relating to 'Succession' and '*Stridhana*' that a woman occupied a very dependent position in the family and her rights to hold and dispose of property were, generally speaking, limited. The partial recognition only of the status of women in matters of property was no doubt understandable under ancient and medieval conditions. However, context, where the focus is on their status, has to be fully recognised in modern times of social emancipation and equality.

The principal reform that was called for, and one which became a pressing necessity in view of changed social and economic conditions, was that in succession, there should be equitable distribution between male and female heirs and the Hindu women's limited estate should be enlarged into full ownership. The Hindu Women's Rights to Property Act 17 of 1937, introduced important changes in the law of succession by conferring new rights of succession on certain category of females. Although better rights were given to women in respect of property, it was found to be incoherent and defective in many respects and gave rise to a number of anomalies. Fragmentary legislation in the form of number of uncoordinated rules did not prove a satisfactory remedy and the mass of floating case-law that grew up was somewhat bewildering. There seemed to be no end to the number of conundrums suggested.

The spacious and complicated structure that was Hindu law in the main, remained undigested except by authors. Good exposition of law made by them and good judicial law made by able juriconsults could not obviously bring the law precisely on a level with the codification of it by the authority of the supreme legislature. It has been generally recognised for a long time that the rule of inheritance should be turned into a body of law, compact in form, and easily accessible. A uniform and comprehensive system of inheritance recognising equable distribution between male and female heirs and contained in a series of coherent propositions carefully considered and authoritatively stated was, therefore, a long-felt desideratum.

The Hindu Succession Act came into force on 17 June 1956. It amends and codifies the law relating to intestate succession among Hindus and brings about some fundamental and radical changes in the law of succession. Even if it seems to break violently with the past, it has to be conceded that it is a characteristic of the age, which is one of great ideals and fast changing social, economic and political theories. Hindu law, was at no time in its long history static, but was empiric and progressive. It was only after the taking over of India by the British, and because of their policy of non-interference in matters of personal law, that it ceased to grow with the time. Its principal characteristics of elasticity and assimilation were ignored and the decree of rigidity given to it was such, that legislation alone could cope with the felt necessities of the times.

UNIFORM LAW OF SUCCESSION: WIDE APPLICATION OF THE ACT

The Act lays down a uniform and comprehensive system of inheritance and applies inter alia to persons governed by Mitakshara and Dayabhaga Schools, as also to those in certain parts of southern India who were previously governed by the *Murumakkattayam*, *Alyasanatana* and *Nambudri* systems of Hindu law. The Act applies to any person who is a Hindu by religion in any of its forms and developments, including those who have deviated from orthodox standards of Hinduism in matter of ceremonial observances. Buddhists, Jains and Sikhs are also within its ambit. So also converts or reconverts to any of the four religions—Hinduism, Buddhism, Jainism and Sikhism. A person, therefore, though not strictly a Hindu by religion is included in the wide connotation given to the expression 'Hindu' (s 2). It is not a mere laconism to observe that it is easier to say who are not Hindus, or that the practical separation of Hindus from non-Hindus in the matter of applicability of the Act, is not matter of much difficulty. Clause (c) of sub-s (1) of that section adopts the negative form and in effect lays down that it is to be presumed, until the contrary is proved, that any person who is not a Muslim, Christian, Parsi or Jew by religion is governed by this Act. The purpose of

this, evidently, is to avoid as far as possible, detailed and at times complex inquiries into the matter.

OVERRIDING EFFECT OF THE ACT

Section 4 of the Act is of vital importance and gives overriding effect to the provisions of the Act.² It abrogates all the rules of the law of succession hitherto applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt with in the Act. The Act also supersedes any other law, contained in any Central or State Legislation in force immediately before it came into operation in so far as such legislation is inconsistent with the provisions contained in the Act.

SCHEME OF THE ACT

The scheme of the Act in the matter of succession to the property of a Hindu dying intestate (after the coming into force of the Act) is to lay down a set of general rules for succession to the property of a male Hindu in ss 8–13, including rules relating to ascertainment of the shares and portions of the various heirs, which may be described as the statute of distribution. It is part of this scheme, to enact in ss 15 and 16, separate general rules affecting succession to the property of a female intestate. Section 17 provides for certain modifications and changes in the general scheme of succession to the property of male and female Hindus in relation to persons hitherto governed by the Malabar and *Aliyasantana* law. The existence of a system founded on matriarchy in certain parts of southern India, in contradistinction to that in the rest of the country, which is patriarchal having the common ancestor as the founder of the family and in chief relationship is primarily by agnation, has been well established and judicially recognised for a long time. Recently, a number of enactments regulating succession to the property of persons governed by the *Marumakkatayam*, *Aliyasantana*, and *Nambudri* laws have found place on the statute book.³ Reference to the rules enacted in s 17 of this Act will show that the legislature, while aiming at a uniform code, has taken care to provide for suitable modifications with regard to the law of those who favoured the matriarchate. Sections 18–28 of the Act are headed ‘General provisions relating to succession’ and lay down rules which are supplementary to the provisions in ss 5–17. The rules laid down in those sections are not merely explanatory of the general rules for succession. Some of them enact substantive provisions involving legal principles.

² Reference may be made inter alia to notes under ss 6, 8, 14, 15 and 30.

³ A number of these are stated in the definitions given in s 3.

SUCCESSION TO PROPERTY OF A MALE INTESTATE

Four categories of heirs

The two systems of inheritance to the separate or self-acquired property of a male intestate, which hitherto prevailed under Mitakshara and Dayabhaga Schools, are abolished and a uniform system comes into operation as propounded in s 8. The three classes of heirs recognised by Mitakshara, ie, *Gotraja Sapindas*, *Samanodakas* and *Bandhus* and the three classes of heirs recognised by Dayabhaga, ie *Sapindas*, *Sakulyas* and *Bandhus* cease to exist in case of devolution taking place after the coming into force of the Act. The heirs are divided, instead, into four classes or categories. These are: (i) heirs in Class I of the Schedule; (ii) heirs in Class II of the Schedule; (iii) agnates; and (iv) cognates. The property devolves first on the 12 preferential heirs mentioned in Class I of the Schedule to the Act, and failing such heirs upon the second, third and fourth class of heirs in the order as regulated by ss 8 and 9. Before 1937, the 'simultaneous heirs' of a male Hindu dying intestate comprised only the son, the son of a predeceased son and the son of predeceased son of a predeceased son. The Hindu Women's Rights to Property Act 1937, added to the list the widows of the first two, as well as the intestate's own widow. The outstanding feature of the new scheme, of what may for convenience be described as the 'simultaneous heirs' or 'preferential heirs', is that the property devolves in equal shares among the son, daughter, widow, and mother of the deceased. Eight other heirs come into this scheme of simultaneous succession by virtue of the doctrine of representation as appealed to the case of predeceased son and predeceased daughter. The distribution of property among these preferential heirs is to be in accordance with the four rules laid down in s 10. It will be noticed that male and female heirs are treated as equal and without distinction. In Class II of the Schedule, are specified heirs who are entitled to succeed in the order of entries in which certain persons have been grouped together for simultaneous succession like father, brother and sister, and so on. They succeed in case of failure of any of the 12 heirs in Class I. They are also close relations of the Hindu male selected on the principle of natural love and justice. They are the intestate's father; great grandchildren—both males and females (except the son's son's son who is an heir in Class I); brother; sister; sons and daughters of brother and sister; father's father and father's mother; step-mother and brother's widow; father's brother and sister; mother's father and mother's mother; and mother's brother and sister. These heirs in Class II do not all succeed simultaneously, but in order of the nine entries in which they are grouped. It will be noticed that some close relatives of the mother are included among the heirs in this scheme of succession and given preference over the other relations who can succeed only as agnates or cognates. The distribution of property among the heirs specified in Class

II of the Schedule, who are entitled to succeed in order of the entries in which they are placed, is to be in accordance with the rule laid down in s 11. The rules of preference is determinative of the order of succession and those relating to the mode or method of reckoning degrees of ascent and descent, and descent according to which priority among agnates and cognates is regulated, are stated in ss 12 and 13.

PROPERTY OF A FEMALE HINDU TO BE HER ABSOLUTE PROPERTY

The Hindu women's limited estate is abolished and any property possessed by a female Hindu, howsoever acquired, is now held by her as her absolute property and she has full power to deal with it or dispose it of by will as she likes. The restraints and limitations on her power cease to exist even in respect of existing property possessed by a female Hindu at the date of the Act coming into force, whether acquired by her before or after the commencement of the Act. It is now held by her as full owner and not as a limited owner (s 14).

SUCCESSION TO PROPERTY OF FEMALE INTESTATE

Under the previous law, succession to *stridhana*—woman's property—varied according to the woman being married or unmarried, and according to the form of her marriage. It also varied according to the source of the *stridhana*. The rules of descent of the different schools also varied. The Act abolishes all this and propounds in s 15, a definite and uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. This section groups heirs of a female intestate into five categories, described as Entries (a)–(e). Sons, daughters, children of any predeceased son or predeceased daughter and the husband are her heirs specified in Entry (a). They take simultaneously, and to the exclusion of those specified in the subsequent entries. Failing all heirs of the intestate female specified in Entry (a), but not until then, her property devolves upon the heirs of the husband as laid down in Entry (b). Heirs in Entry (b) are preferred to that listed in entry (c), who are the mother and father of the intestate. On failure of the mother or father, the property devolves upon the heirs of the father (Entry (d)) and in case of failure of all the heirs in entries (a)–(d), the property devolves upon the heirs of the mother. This is not, however, a complete statement of the law since there are two important exceptions engrafted upon the general order of succession enacted in the five entries. The exceptions relate to property inherited by the female from her mother or father and property inherited by her from her husband or father-in-law. In case of a female intestate dying without issue, property inherited by her from her father or mother will revert to the heirs

of the father in existence at the time of her death and not upon the husband or the heirs of the husband in accordance with the general order of succession laid down in the entries. Similarly, in case of a female intestate dying without issue, property inherited by her from her husband or father-in-law (as widow of a predeceased son) will revert to the heirs of the husband in existence at the time of her death and not upon the heirs of the father or mother in accordance with the general order of succession laid down in the entries. No question of the application of either exception can arise where the female intestate dies leaving a son, daughter or a child male or female of any predeceased son or daughter. In such a case, that is, when she dies leaving any issue, all her property howsoever acquired devolves upon such issue regardless of the source of acquisition of the property and such issue takes the property simultaneously; and if the husband of the intestate is alive, takes simultaneously with him. The rules relating to the mode or manner of computation of shares of the various heirs are stated in s 16.

MITAKSHARA COPARCENARY RETAINED IN AN ATTENUATED FORM

The Act, although it deals with succession, has a bearing on other branches of Hindu law such as joint family, joint family property, ancestral property, separate property, adoption, etc, and lays down rules of far-reaching consequences. It prescribes that where a coparcener dies intestate, Mitakshara coparcenary does not necessarily become disrupted. According to the true notion of an undivided family governed by Mitakshara law, no individual member of the coparcenary, whilst the family remains joint and undivided, can predicate of the joint family property that he has a definite share in. His interest is a fluctuating interest, capable of being enlarged by deaths in the family and liable to diminish by births in the family. It is only on a partition that he becomes entitled to a defined share. Section 6 of the Act, although it does not interfere with the special rights of those who are members of a Mitakshara coparcenary, recognises, without abolishing joint family property, the right, upon the death of a coparcener, of certain of his preferential heirs to claim an interest in the property that would have been allotted to such coparcener if a partition of the joint family property had in fact taken place immediately before his death. Such preferential heirs, to mention some, are the daughter, the predeceased daughter's son and the predeceased son's daughter. There can be little doubt that radical reform was required in the Mitakshara law of coparcenary, in particular, where one of the coparceners died, there should be equitable distribution of his property not only in respect of his separate or self-acquired property but also of his undivided interest in the coparcenary property among his male and female heirs and particularly his son and daughter. Some of the initial features of the ancient joint family system had become extinct in consequence of

inroads made upon the coparcenary *inter alia*, by liberal interpretation of text relating to partition, by rules founded on equitable considerations affecting payment of debts incurred personally by any member of the coparcenary and principally by the Hindu Women's Rights to Property Act 1937, which conferred new rights on widows of coparceners. The power of free disposition of property is recognised in every system of law and it was time for Hindu law to fall in line. Probably the best solution would have been to abolish the ancient legal formulae of acquisitions of right by birth and devolution by survivorship since the logical way was to assimilate Mitakshara to Dayabhaga in this respect. This would also have the merit of equable treatment of the nearest female heirs of a coparcener and of bringing about uniformity in the law in all parts of India. Sentiment in favour of retention of Mitakshara coparcenary, even in an attenuated form, seems to have been respected and the rules laid down in s 6 are a compromise having some of the merits and also the demerits, which attend such adjective legislation.

Prior to the coming into operation of this Act, it was a rule firmly established that a Hindu cannot by will bequeath property, which he could not have alienated by gift *inter vivos*. A coparcener under Dayabhaga law, however, could, by gift, dispose of the whole of his property whether ancestral or self-acquired, subject to the claims of those entitled to be maintained by him. A coparcener under Mitakshara law has no power to dispose of his coparcenary interest by gift. This rule is not affected by the new legislation, but the extension of that conception which disentitled such coparcener to make bequest of his interest in the coparcenary property, so as to defeat the rights of the other members to take by survivorship, is now abolished (s 30). Any Hindu male or female may now dispose off, by will or other testamentary disposition, any property (including in case of a male any interest in a Mitakshara coparcenary), in accordance with the provisions of the Indian Succession Act 1925, or any other law relating to such dispositions applicable to Hindus. This power of testamentary disposition is, however, subject to the rights of maintenance of persons who are entitled to claim maintenance as dependants of the testator or testatrix. Sections 18–21 of the Hindu Adoption and Maintenance Act lays down rules relating to the rights of maintenance of a wife, widowed daughter-in-law, children, aged parents and other dependants. Section 22 of that Act rules that where a dependant has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of that enactment, the dependant shall be entitled, in accordance with the provisions of the same, to maintenance from those who take the estate.

SOME GENERAL RULES

The general provisions of the Act relating to succession contain rules *inter alia* to the effect that heirs related to a male or female intestate by full blood

are to be preferred to those related by half-blood, if the nature of relationship is the same in every other respect (s 18). Another important rule is that if two or more heirs succeed together to the property of an intestate, they take the property per capita and not *per stirpes* unless there is provision which expressly lays down a contrary rule. Such heirs take the property as tenants-in-common and not as joint tenants (s 19). Instances of succession *per stirpes* are to be found in the provisions of s 10, which deals with distribution of property among heirs in Class I of the Schedule and r 2 of s 16. The latter provides that if any son or daughter of a female intestate had predeceased her, leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take *per stirpes* (not per capita), that is they shall take between them the share which such son or daughter would have taken of living at the time of the intestate's death. A child *en ventre sa mere*, who is subsequently born alive, has the same right to inherit property as if he or she had been born before the death of the intestate (s 20).

DISQUALIFIED HEIRS

Under the texts of the *Dharmashastras* as interpreted by the courts, certain defects, deformities and diseases excluded an heir from inheritance. This was substantially remedied by the Hindu Inheritance (Removal of Disabilities) Act 1928, which ruled that 'no person, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share of joint family property by reason only of any disease, deformity or physical or mental defect'. Unchastity of certain female heirs, change of religions and loss of caste were among the grounds which imposed exclusion from inheritance recognised by law. Section 28 of the present Act discards almost all the grounds which imposed exclusion from inheritance and rules that no person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity. It also rules out disqualification on any other ground whatsoever, excepting those expressly recognised by any provisions of the Act. The exceptions are very few and alongwith changes brought about by ss 24, 25 and 26, another change brought about by the Act is that impartible estates (other than those expressly saved by s 5(ii) and 5(iii) of the Act) cease to be recognised as such. Such property has, now under the Act, all the ordinary incidents of property held by a Hindu.

The new legislation is characteristic of the age which is one of great ideals and fast changing theories. There is considerable force in the remark belonging to times long past, that rules of succession to property being in their nature arbitrary, are in all systems of law merely conventional, and even deep rooted traditions must yield to the march of time.

Recent Changes

Yielding to the march of time adverted to above, and perhaps realising the immortal words of Roscoe Pound, as appearing in his celebrated treatise *The Ideal Element in Law*, that '... the law must be stable and yet it cannot stand still...', further fundamental changes have been brought about in the Hindu Succession Act 1956, by amending it recently in 2005. The amendment removes many disparities and disabilities.

- Deletion of sub-s (2) of s 4, dealing with non-applicability of the Act to statutes dealing with prevention of fragmentation of agricultural holdings or fixation of ceilings or devolution of tenancy rights in respect of such holdings. The effect being that the deeming fiction has ceased to exist and the act will thus become applicable to such holdings also.

- Section 6, substituted by a new section, stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as a son. These changes sought to be made on the touchstone of equality, thus seeks to remove the perceived disability to which a daughter was subjected.

- On the death of a Hindu having an interest in coparcenary property, such property would devolve by either testamentary or intestate succession, as the case may be, and not by survivorship. The explanation to sub-s (3) states that the interest of a Hindu Mitakshara coparcener would be deemed to be the property which would have been allotted to him if a partition has taken place immediately before his death, irrespective of whether such coparcener was entitled to claim partition or not.

- The amendment exempts a son, grandson or great grandson to fulfil the debt contracted by his father, grandfather or great grandfather, subject to certain exceptions. Since the provision is prospective, the right of a creditor to proceed against the enumerated heirs, for debts contracted before the amendment, has been kept intact. Partitions that have been effected before the amendment have been excluded from the provisions of the Act. An explanation has been added to sub-s (5) stipulating that a partition would mean a partition effected by execution of a deed duly registered or a partition duly effected by a decree of a court.

- Section 23 of the Act, dealing with special provisions as regards dwelling houses and the right of a female heir to seek partition of the dwelling house, has been omitted by the amendment. This is by virtue of the fact that necessary changes have been made treating daughters as coparceners, the necessary corollary thereto being the right of the daughter to seek partition of the dwelling house in her own right.

- Section 24 of the Act, dealing with the disability of a widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother, to succeed to the property in case of such widows remarriage, has been deleted, thus removing the disability and permitting succession to the property to which she is entitled. This disability under the section, was however, confined only to the categories of heirs stipulated therein.

- Section 30 of the Act has been amended by inclusion of a female Hindu, thus recognising her right over disposal of property that she is capable of disposing off. The schedule in class I has been amended by inclusion of son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; and daughter of a pre-deceased daughter of a pre-deceased son. These heirs would be entitled to succeed as heirs in class I.

THE HINDU SUCCESSION ACT 1956



30 OF 1956

[17 June 1956]

An Act to amend and codify the law relating to intestate succession among Hindus

Be it enacted by Parliament in the Seventh Year of the Republic of India as follows:

PREAMBLE

A preamble to an enactment of the legislature was formerly regarded as a key to open the mind of the makers of the Act, and the mischief which they intended to redress. The practice of inserting elaborate preambles in enactments of legislature has disappeared and it is now regarded as well settled that a preamble cannot either restrict or extend the enacting part when the language and the scope of an Act are not open to doubt. It sometimes happens that a preamble is narrow but the enacting words large. Assistance may be obtained from the preamble to a statute in ascertaining the meaning of the relevant enacting part, since words derive their colour and content from their context. But the preamble is not to affect the meaning otherwise ascribable to the enacting part unless there be a compelling reason that the enacting words go further than the preamble indicated.¹ The preamble of the present Act speaks only of the law relating to intestate succession among Hindus. Chapter III of the Act, however, headed 'Testamentary Succession,' enacts inter alia in express and explicit terms that a male Hindu is entitled to dispose of by will his interest in property of a Mitakshara coparcenary and recognises similar power in case of property of a *tarwad* and other family corporations governed by *Marumakkattayam* and *Aliyasantana* laws in southern India.

¹ *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436

CODIFYING ACT

It is clear from the preamble that it is intended by the Act not merely to amend, but also to codify the law relating to intestate succession. As pointed out above, the Act in Chapter III lays down certain rules relating to the testamentary capacity of Hindus. The object of codification of a particular branch of law is that, on any matter specifically dealt with by it, such law should be sought for in the codified enactment itself. Where a statute is expressly said to codify the law, the court, as a general rule, is not at liberty to go outside the law so created simply because before the existence of that enactment another law prevailed. Reference may be made in this connection to the notes and the decisions cited there.

Question may arise whether this Act is a complete code in the sense of comprehensive legislation dealing with every phase and aspect of the law of succession. If it entitles an Act to amend and codify a particular branch of law, in so far as there is express enactment, that alone must be looked at since the court is bound by it and can look to nothing else. The express enactment must govern the rights of the parties even though it has radically altered or modified the prior law. The Act, as already been pointed out, has brought about some fundamental and radical changes in the law of succession previously applied to Hindus. Reference in this connection may be made to s 4, which gives overriding effect to the provisions of the Act. It follows that with respect to matters for which provision is made in the Act the prior law ceases to have effect to the extent laid down in that section. It also follows that in respect of matters for which no provision is made in the Act the old law must continue to remain applicable though such matters are indeed few.

RULES OF INTERPRETATION OF A STATUTE

For some of the rules relating to interpretation see notes.

CHAPTER I

PRELIMINARY

1. Short title and extent.—(1) This Act may be called the Hindu Succession Act 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

TITLE

Two propositions are now accepted as quite clear—that the title is part of the enactment itself and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope, and that a title cannot be

permitted to control or cut down the enacting part of any section by the use of language of less extensive import. The title to the present Act states that the Act relates to the law of succession among Hindus and not merely intestate succession as mentioned in the preamble.²

EXTENT AND COMMENCEMENT

The Act applies to Hindus in the whole of India except the State of Jammu and Kashmir. It received the assent of the President on 17 June 1956, and came into force on that date. Reference may be made to the Jammu and Kashmir Hindu Succession Act 38 of 1956, which embodies most of the provisions of the Hindu Succession Act of 1956 with suitable modifications.

The general principle of private international law is that the *lex loci* governs matters relating to immovable property and the law of the domicile governs personal relations. The principle is embodied in s 5 of the Indian Succession Act. The Draft Bill contained the words 'and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories'. Those words were removed and it was observed by the Joint Committee that, 'there are well-defined principles of international law which regulate succession to the immovable property of Hindus domiciled outside India and, consequently, that portion of this clause which provides for extra-territorial application of this law has been removed as both unnecessary and inappropriate'.

2. Application of Act.—(1) This Act applies—

- (a) to any person, who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;
- (b) to any person who is a Buddhist, Jain or Sikh by religion; and
- (c) to any other person who is not a Muslim,³ Christian,⁴ Parsi or Jew by religion unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation—The following persons are Hindus, Buddhists, Jains or Sikhs by religion, as the case may be:—

² See General Clauses Act 1897 (10 of 1987), s 5 (1)(b).

³ A person who had converted to Islam cannot be regarded as a Hindu simply because such person had inherited property despite conversion by reason of the Caste Disabilities Act: *Fakeer Bux v Saira Begum* AIR 1972 All 475.

⁴ See s 28 *post*.

- (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;
- (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;
- (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion.

(2) Notwithstanding anything contained in sub-s (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of cl (25) of art 366 of the Constitution, unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

PERSONS GOVERNED BY THE ACT

It must have been seen from § 6(1) [Vol I] that Hindu law has been applicable to a wide category of persons. The note to cl 2 of the Hindu Marriage Bill stated:

At present, Hindu law applies:

(i) to Hindus by birth, and also to Hindus by religion, that is to say, to converts and re-converts to Hinduism; (ii) to illegitimate children where both parents are Hindus; (iii) to illegitimate children where the mother is a Hindu and the children are brought up as Hindus; (iv) to Brahmos, Arya Samajists, Lingayats and to persons who may have deviated from orthodox standards of Hinduism in matters of diet and ceremonial observances and to every other person who may be regarded as a Hindu unless he can show some valid local, tribal or family custom to the contrary; and (v) to Jains, Sikhs and Buddhists.

The present section substantially codifies the law on the question as it existed at the time of the commencement of this enactment.

Reference may also be made to §§ 6 and 7 [Vol I].

Reference is invited to the under mentioned decisions⁵. Attention is also invited to s 2 of the Hindu Marriage Act and the decisions cited thereunder.

⁵ *Commr of Wealth Tax v Champa Kumari* AIR 1972 SC 2119 (Jains); *Rosa Marie v Commr of Wealth Tax* AIR 1970 Mad 249 (child brought up as Hindu, Member of Hindu Undivided Family). For applicability to Scheduled Tribes

CHRISTIANS IN THE STATE OF PONDICHERRY

Christians in the State of Pondicherry continue to be governed by the Hindu customary law of succession.⁶

3. Definitions and interpretations.—(1) In this Act, unless the context otherwise requires—

- (a) 'agnate'— one person is said to be an 'agnate' of another if the two are related by blood or adoption wholly through males;
- (b) '*aliyasantana* law' means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Aliyasantana Act 1949 (Madras Act IX of 1949), or by the customary *Aliyasantana* law with respect to the matters for which provision is made in this Act;
- (c) 'cognate'— one person is said to be a 'cognate' of another if the two are related by blood or adoption but not wholly through males;
- (d) the expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

- (e) 'full blood', 'half blood' and 'uterine blood'—
 - (i) two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives;
 - (ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

see: *Satish Chandra v Bagram* AIR 1973 Gau 76 (Bore Borakshai tribe); *Dashrath v Guru Bewa* AIR 1972 Ori 78 (Bathudi sub-caste); *Gopal Singh Bhumji v Girbala Bhumji* AIR 1991 Pat 138 (Scheduled Tribe members governed by customary laws not Hindus); 5 *Lalsai v Bodhan Ram* AIR 2001 MP 159 (Uraon community of MP. Hindu Succession Act applicable); *Kailash Singh v Mevatal Singh* AIR 2002 MP 112 (act does not apply to Gond community—widow only inherits as limited owner).

⁶ *Pauline Lucas v Jerome Pascal* AIR 1977 Mad 270; also see *Lois Marie v Alexis Sarasamma* AIR 1984 Mad 271.

Explanation.—In this clause ‘ancestor’ includes the father and ‘ancestress’, the mother;

- (f) ‘heir’ means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;
- (g) ‘intestate’—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;
- (h) ‘*marumakkattayam law*’ means the system of law applicable to persons—

- (a) who, if this Act has not been passed, would have been governed by the Madras Marumakkattayam Act 1932 (Madras Act XXII of 1933); the Travancore *Nayar* Act (II of 1100); the Travancore *Ezhava* Act (III of 1100); the Travancore *Nanjinad Vellala* Act (VI of 1108); the Travancore *Kshatriya* Act (VII of 1108); the Travancore *Krishnanvaka Marumakkathayee* Act (VII of 1115); the Cochin Marumakkathayam Act (XXXIII of 1113); or the Cochin *Nayar* Act (XXIX of 1113) with respect to the matters for which provision is made in this Act; or

- (b) who belong to any community, the members of which are largely domiciled in the State of Travancore-Cochin or Madras [as it existed immediately before the 1st November 1956], and who, if this Act had not been passed, would have been governed with respect to the matters for which provision is made in this Act by any system of inheritance in which descent is traced through the female line; but does not include the *aliyasantana* law;

- (i) ‘nambudri law’ means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Nambudri Act 1932 (Madras Act XXI of 1933); the Cochin Nambudri Act (XVII of 1113); or the Travancore Malayala Brahmin Act (III of 1106) with respect to the matters for which provision is made in this Act;

- (j) ‘related’ means related by legitimate kinship:

Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

(2) In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females.

It will be seen that the definitions given in this section are not all intended merely to economise words. Thus, for instance the proviso to the definition of the expression 'related' lays down a legal principle.

'UNLESS THE CONTEXT OTHERWISE REQUIRES'

The definitions and abbreviations given in this section have to be read subject to the qualification that their application must not be inconsistent with the context or subject-matter. Even when an Act contains a section giving definitions and interpretations, the latter may not be applicable in all the contexts. Where there is something repugnant in the context showing that the definition will not fit, the court will give such meaning to the expression as will be more in harmony with the context and allow it to prevail over the 'artificial conceptions' of the definition clause.

'AGNATES': 'COGNATES'

Ordinarily agnates means relatives on the male side, in opposition to cognates, relatives on the female side. The key words in the definition of agnate are 'wholly through males'. The expressions must be understood in the technical sense of the definitions and not in the sense in which the expressions *gotraja* and *bandhu* are used in the old law.

'ALIYASANTANA LAW': 'MARUMAKKATTAYAM LAW': 'NAMBUDRI LAW'

These definitions relate to application of the Act to persons governed by *Aliyasantana*, *Marumakkattayam* and *Nambudri* laws. Reference may be made to ss 7 and 17 *post*.

'CUSTOM': 'USAGE'

The definition of the expressions 'custom' and 'usage' very succinctly reproduces the result of numerous decisions of courts under the old law. It will be seen from s 4 *post* that any custom or usage hitherto recognised as part of Hindu law in force ceases to have effect after the commencement of the Act with respect to matters for which provision is made in this Act. The importance of custom must obviously diminish as the system of law ramifies and particularly when the *lex non scripta*, which includes both general custom as well as particular customs, itself becomes the subject-matter of codification.

Reference may be made to s 4 *post* and §§ 17–20 (Vol I).

‘FULL BLOOD; HALF BLOOD; UTERINE BLOOD’

The definitions and the explanation in cl (c) give the meaning of the expressions ‘full blood’, ‘half blood’ and ‘uterine blood’. Section 18, which is one of the general provisions relating to succession, lays down the rule about heirs related to an intestate Hindu male or female by full blood being preferred to heirs so related by half blood. Reference has been made to these expressions in the notes under the relevant sections. The Schedule to the Act contains an explanation affecting relationship by uterine blood in case of certain heirs.

‘RELATED’: RELATIONSHIP BY ADOPTION

Reference may be made to notes under ‘Relative by adoption’ under s 8 *infra*.

‘RELATED’: PROVISO

The general principle of Hindu law is to limit heirship to legitimate issue. The rules of inheritance relating to *sapindas* and other relatives having been based upon marriage and legitimate descent could only be departed from in favour of an illegitimate offspring on the basis of some well-established principle, for instance, in case of children of a dancing woman or a prostitute who claim to be related by heritable blood. It is well settled that dancing women or *naikins* have their peculiar customs and their status recognised in the Hindu law. Although grounds of decision have not been uniform and there has been some diversity of judicial opinion on the subject—the principle of heritable blood between the offspring of a woman of the *naikin* class has been accepted and applied by courts in numerous decisions.

The definition of the expression ‘related’ given in this section naturally confines its meaning to legitimate kinship but the legislature has engrafted an important proviso to the same in order *inter alia* to give recognition in matters of succession to the status of illegitimate children and their mother. The proviso in substance has the effect of expanding the definition of ‘related’ to cover all cases of the nature under consideration. Such children are regarded as related to their mother—though not to their putative father even if his identity may be established—as also to one another and their legitimate descendants are deemed to be related to them and to one another in matters of heirship where any word expressing relationship or denoting a relative is used in the Act. In a Statement of Objects and Reasons, it was pointed out that the expression ‘related’ is so defined that the rights of illegitimate children are safeguarded as against their mother and their own legitimate descendants. Reference may be made to the

undermentioned decision of the Bombay High Court⁷ where this clause and the provisions came up recently for consideration and the same view was taken. This definition follows the Rau Committee's draft where it is pointed out that to confine relationship to legitimate kinship might prevent a *naikin*'s property from passing to her son or daughter and that there is also no reason why a *naikin*'s children should not have mutual rights of inheritance.

SUB-SECTION (2)

The general rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include females (s 13, General Clauses Act). In matters of succession, the general rule would have to be cautiously applied and this sub-section is inserted *ex abundanti cautela*. Words importing the masculine gender must not be taken to include females unless the context so requires.

4. Overriding effect of Act.—(1) Save as otherwise expressly provided in this Act,—

- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) Omitted by the Hindu Succession (Amendment) Act 2005.

OVERRIDING EFFECT OF THE ACT

This section provides for an overriding application of the provisions of the Act. In effect it lays down that in respect of any of the matters dealt with in the Act, it seeks to repeal all existing laws, whether in the shape of enactments or otherwise, which are inconsistent with this Act. As already

⁷ *Shantaram v Dagubai* AIR 1987 Bom 182; also see *Rasala Suryaprakasarao v Rasala Venkateshuvarao* AIR 1992 AP 234 (illegitimate son treated as son entitled to equal share on partition); *G Nirmalaamma v G Sithapathi* AIR 2001 AP 104.

the law of succession, and the result is that immediately on the coming into operation of the Act, the law of succession hitherto applicable to Hindus whether by virtue of any text, rule or interpretation of the Hindu law or any custom or usage having the force of law, ceases to have effect with respect to all matters expressly dealt with by the Act. This overriding effect of the express provisions of the Act has been emphasised in numerous decisions. The undermentioned decisions of the Supreme Court afford some useful instances of such overriding effect.⁸

In a case decided by the Supreme Court,⁹ a Hindu Jat governed by the customary law of Punjab, alienated some ancestral property without legal procedure. In a suit instituted by one of his sons, it was declared that the sale was null and void and not binding on his sons with the result that the sale could not endure beyond his lifetime. He died in 1959 and in the litigation which ensued, it was held that not only his three sons, but also his wife and two daughters were entitled to inherit all his estate including the alienated property, even though the wife and daughters were, under the customary law, incompetent to challenge the alienation.

N, governed by the general Punjab custom, gifted his property to his two daughters in 1946. In a suit filed by a collateral of *N*, it was declared that the property was ancestral and the gifts could not endure beyond his lifetime. *N* died in 1957, and following the above decision in *Giani Ram's* case, it was held by the Supreme Court that the collaterals of *N* were no longer entitled to succeed to the property, but it was the daughters who were the preferential heirs of *N* under s 8, and were entitled to inherit the same.¹⁰

The Act also supersedes the rules of succession contained in any central or state enactment and any other law in force immediately before it came into operation by enacting that all other laws shall cease to apply to Hindus, in so far as it is inconsistent with any provisions contained in the Act. Thus, for instance, the provisions of s 7 of the present Act will apply in case of the undivided interest of a Hindu in the *Aliyasantana Kutumba* or *Kaveru* and devolution as prescribed by s 36(5) of the Madras Aliyasantana Act will give way to provisions of s 8 of the present Act.¹¹

The overriding effect of the Act was recognised when it was held that Punjab agricultural custom, so far as it was applicable to Hindus, is no longer

8 *Pinntharalli Ammal v Ramalingam* AIR 1970 SC 1730; *Mummatal v Rajkumar* AIR 1962 SC 1493; *Commissioner of Wealth Tax v Chander Sen* AIR 1986 SC 1753; *Yudhishter v Ashok Kumar* AIR 1987 SC 558. Reference may also be made to notes under ss 6, 8, 14, 15 and 30. Also see *Bhuri Bai v Champi Bai* AIR 1968 Raj 139. Reference may be made to *Gopal Narain v Goenka* AIR 1971 Del 61.

9 *Giani Ram v Ramji Lal* AIR 1969 SC 1144.

10 *Manshan v Tej Ram* AIR 1980 SC 558. Also see *Kesharbai v State of Maharashtra* AIR 1981 Bom 115 (FB).

11 *Sundari v Laxmi* AIR 1980 SC 198; *Ramanna Rai v Jagannatha* AIR 1982 Kant 270 (property allotted to *Nisanthathi Kaveru*).

in force as regards matters of succession which are now governed by the provisions of this Act.¹² Similarly, in respect of a rule of the law of Kolhapur State relating to ex post facto sanction, it was held that the rule in so far as it was inconsistent with s 14 of this Act, was superseded by cl (b) of this section,¹³ and similarly overriding effect of this section was recognised in respect of ss 3 (4) and 12 of AP (Andhra area) Hereditary Village Offices Act 3 of 1895.¹⁴ Section 9 of the Punjab Debtor's Protection Act, which applies only when succession is governed by any rule of custom, is no longer applicable to Hindus in the Punjab.¹⁵ Reference may be made to the undermentioned decisions, which further illustrate the application of the overriding effect of the Act.¹⁶ There are also the undermentioned decisions relating to general custom in Punjab as regards succession—*Rod and Rattigan's Digest* and entries in *Rivaj-i-am* and also provisions of the present Act.¹⁷

In a recent Full Bench decision of the Kerala High Court, it was held that the provisions of the Travancore Nair Act, in so far as they are repugnant to any of the provisions of this Act are void to the extent of such repugnancy. Considering the provisions of the Kerala Joint Hindu Family System (Abolition) Act, the Full Bench held that the Kerala Act does not repeal s 17 of this Act, the object of the Kerala Act being abolition of the joint family system. Section 17 of this Act makes elaborate provisions regarding the mode of devolution of property, and therefore it does not cease to operate on the passing of the Kerala Act. The effect of the Kerala Act is to repeal the old

12 *Taro v Darshan Singh* AIR 1960 Punj 145: ILR (1959) Punj 2253; for other instances see *Hans Raj v Dhanwant Singh* AIR 1961 Punj 510: ILR (1961) 1 Punj 369; *Banso v Charan Singh* AIR 1961 Punj 45. As to the disposal of ancestral property by will by a Hindu male-holder governed by Punjab customary law, see *Kaur Singh v Jaggar Singh* AIR 1961 Punj 489; *Kalu v Nand Singh* AIR 1974 P&H 50.

13 *Yamunabai v Harihar Pandit* AIR 1960 Bom 463; 1961 Bom LR 1316.

14 *Pentapati Chitty Mahalakshmi v G Subba Rao* (1986) AP 52 (FB).

15 *Ishwar Das v Raj Kumar* AIR 1964 Punj 275.

16 *Topba v Samman* AIR 1972 P&H 406 [gift of occupancy rights by widow, Punjab Tenancy Act s 59(3)]; *Gopi Chand v Bhagwani Devi* AIR 1964 Punj 227 (Delhi Land Reform Act); *Ramlali v Bhagwanti Bai* AIR 1968 MP 247 (MP Land Revenue Code). *Hari Singh v Sireh Kanwar* AIR 1974 Raj 197 (Jaipur Hindu Women's Rights to Property Act 1947). The Mayurbhanj Lakhraj Control Order 1937, which prevents women from succeeding to *Brahmottar* grants, ceased to have effect, *Phulmani v State* AIR 1974 Ori 135; *Pritam Singh v Asst Controller of Estate Duty* 1978 PLR 342 (Sikhs, Jats); *TM Channabasamma v TM Rudhiah* AIR 1982 Kant 198 [definition of 'agnate' in Mysore Act 10 of 1933 must be ignored being inconsistent with s 3(1)]. *Elambilakkat Chandrasekharan v Moroth Seethamani* AIR 1991 Ker 408 (customary succession of *Thiyyas* overridden).

17 *Kaher Singh v Chanen Singh* AIR 1968 SC 806 (daughter preferred to collaterals). *Jai Kaur v Sher Singh* AIR 1960 SC 1118 (conflict between *Rivaj-i-am* and *Rattigan*—former usually prevails). *Ujagar Singh v Jeo* AIR 1959 SC 1041 (general custom) Sikh Jats of Amritsar governed by Hindu Law; *Harchand Singh v Mohinder Kaur* AIR 1987 P&H 138 (unmarried daughters entitled to succeed to property of their deceased father and not the mother of the deceased, father).

Marummakkathayam Law.¹⁸

The Act is a codifying enactment.¹⁹ It does not merely crystallise or declare the existing law upon the subject, but deliberately departs from the law in respect of various matters. It supersedes prior law, lays down the whole law of succession in the form of a code, and so far as it goes, must be read as a complete enactment. Therefore, in cases governed by the Act, appeal to any rule of law of succession previously applicable to Hindus is now permissible only in respect of matters for which no provision is made in the Act.²⁰ Matters affecting succession expressly saved from the operation of the Act, of course, continue to be governed by the previous law, statutory or otherwise.

One outstanding exclusion from the operation of the Act is contained in s 5(1), and relates to succession to property of persons whose marriage is solemnised under the Special Marriage Act 1954, and to property of the issue of such marriage. Succession to the property of such persons is regulated by the provisions of the Indian Succession Act, and not this Act. Section 5 also specifies certain other property to which this Act does not apply.

The Act does not touch or affect the law relating to joint family and partition and the previous law continues to operate in such matters. Thus for instance, the right of a mother or widow to a share on partition between the father and sons in a Mitakshara family or between the sons after the death of the father, is not affected or abrogated by this Act. The undermentioned case affords an illustration of this.²¹

The Act also does not abrogate any rule of customary law in Punjab relating to restriction on alienation by a male proprietor. The right of reversioners to challenge or control any such alienation cannot be said to have ceased to exist.²²

AGRICULTURAL LAND: COMMENTARY ON DELETED SUB-S(2)

It is sometimes said that the Act does not apply to agricultural lands, but that would not be a correct proposition. Sub-section (2) relates only to certain specified matters and subject to that, the provisions of the Act must govern succession to agricultural lands too.²³

Considerable legislation by various states, aimed at prevention of fragmentation of agricultural holdings and securing their consolidation and for the purpose of fixing ceilings and devolution of holdings, has found

18 *Chellamma v Narayana* AIR 1993 Ker 146 (FB) (case-law discussed).

19 Refer to the 'Preamble' and the 'Codifying Act'.

20 Thus, for instance, the conception of a reversioner is not wholly abolished by this section. See notes under s 14 *post*; *Gangadhar v Saraswathi* AIR 1962 Ori 190.

21 *Gopal Narain v DP Goenka* AIR 1971 Del 61.

22 *Joginder Singh v Kehar Singh* AIR 1965 Punj 407.

23 *Tukaram Jadhav v Laxman Jadhav* AIR 1994 Bom 247.

place in the statute-book in recent years and this section is not intended to override or disturb such legislation. Land policy in different states, though founded on the concept of a socialist welfare state, cannot be expected to be uniform and sub-s (2), therefore, leaves such legislation relating to agricultural land undisturbed. Agricultural land is the bulk of property in India, and it may perhaps be said that this provision detracts from the fundamental objective of uniformity of legislation. However, the explanation is that what is aimed at is a uniform law for all Hindus and not necessarily a uniform law for all forms of property. It is only matters mentioned in the sub-sections that are saved from the operation of the act and not the right to succeed to agricultural lands. The Delhi Land Reform Act, not being one providing for prevention of fragmentation of agricultural holdings, is not saved by this sub-section.²⁴

Where a tenancy or land tenure legislation makes a special provision for devolution of rights to lands, then those will prevail and in that event, the provisions of this Act will be inapplicable to such devolution. However, if the land tenure legislation itself makes the personal law of the parties applicable, the provisions of this Act must be applied.²⁵ Thus, if the legislation makes a specific provision as to the mode of devolution and also specifies persons entitled to hold the land as also their shares, this act cannot apply.²⁶

A Hindu widow who is allowed to remain in possession of *khudkast* and *sir* does not become *bhumidar* by operation of s 14 of this Act.²⁷

Also see notes under s 5.

THE ACT IS NOT RETROSPECTIVE IN ITS OPERATION

It is a fundamental and firmly established rule of interpretation, that a statute which deals with rules of substantive law, shall not be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary implication. There is a clear indication in this section read with the other important sections of the Act that it is not intended to have retrospective effect. A contrary rule would

24 *Gopi Chand v Bhawani Devi* AIR 1964 Punj 272.

25 *Bajya v Gopikabai* AIR 1978 SC 793; *Nabar Hirasingsh v Dukalbin* AIR 1974 MP 141 (FB) dissenting from *Indubai v Vyankati* AIR 1966 Bom 64; also see *Dhananjaya v Gajra* AIR 1977 Bom 436, and see *Nidhi Swain v Khati Dehya* AIR 1974 Ori 70 (Application of Act to agricultural lands is not excluded).

26 *Sooraj v SDO Rebli* AIR 1995 SC 872; *Vijay Pal Singh v Dy Director of Consolidation* AIR 1996 SC 146.

27 *Prema Deri v Joint Director of Consolidation* AIR 1970 All 238; *Uma Shankar v Dy Director of Consolidation* AIR 1973 All 407; *Palak Dhari v Dy Director of Consolidation* AIR 1975 All 410 (Interest of female *bhumidar* cannot be bequeathed by will, UP Zamindari and Land Reforms Act 1950); see *Ramakant v Dy Director of Consolidation* AIR 1975 All 125.

have the very serious consequence of prejudicially affecting vested rights and of disturbing titles and legality of past transactions.

The general rule that an enactment like the present should operate only in cases and in respect of facts which come into existence after it was passed—*nova constitutio futuris formam imponere debet, non praeteritis*—has been accepted by the legislature and the exceptions to its application in the Act are indeed few.

It has been held in a number of cases, such exceptions apart, that the provisions of the Act are prospective and not retrospective in their operation.²⁸ Since the Act is not retrospective in its operation, it follows that succession would not be governed by the Act where it opened before the commencement of the Act.²⁹ Reference may be made to notes as regards succession and partition in case of impartible estates.

One notable exception is to be found in s 14 of the Act. As has already been pointed out, the Hindu woman's limited estate is now abolished and any property held by a female Hindu howsoever acquired, is now held by her as an absolute property with full powers of disposal. The restraints and limitations on her power cease to exist even in respect of existing property, so that any property possessed by a female Hindu whether acquired by her before or after the commencement of the Act, is now held by her as full owner. This enlargement of the estate of a female Hindu is, therefore, not confined to property acquired by her after the coming into operation of the Act, but embraces all property possessed by her even if it was acquired by her at any time prior to the Act if the case falls within the ambit of s 14. Another instance where the Act operates retrospectively is to be found in s 26, which affects the rights of the descendants of a convert from Hinduism.

CHAPTER II

INTESTATE SUCCESSION

GENERAL

Succession to the property of a Hindu is now governed by the provisions contained in this chapter. Sections 5–17 are grouped under the heading 'General' and ss 18–28 under the heading 'general provisions relating to succession'. Succession to the property of a male intestate and that of a female intestate is not governed by the same rules. The distinction was necessitated by some peculiar conditions in the country. Section 8 lays down certain general rules of succession to the property of a male Hindu

²⁸ *Gurmit Singh v Tara Singh* AIR 1960 Punj 6, *Sampathkumari v Lakshmi Ammal* AIR 1963 Mad 50 (s 8); also see notes under various sections.

²⁹ *Hans Raj v Dhanwant Singh* AIR 1961 Punj 510.

dying intestate, after the commencement of the Act. Section 15 lays down general rules of succession in the case of a female Hindu. Section 17 lays down certain special rules of succession respecting persons governed by *marumakkattayam* and *aliyasantana* laws.

The Act, as already pointed out, is a codifying enactment, and overrides the previous law on the subject of inheritance. Application, therefore, of any previous rules of succession governing Hindus is now permissible only in respect of matters for which no provision is made in the Act and matters expressly saved from the operation of the Act.

INHERITANCE NEVER IN ABEYANCE

One governing principle of Hindu law is that inheritance can never be in abeyance. On the death of a Hindu, the person who is then his nearest heir, or persons who are then his nearest heirs and as such, succeed simultaneously to his property, become entitled at once to the property left by him. The right of succession vests in such heir or heirs immediately on the death of the owner of the property.

The same principle underlies the provisions of the Act. Devolution of the property of a male or female intestate upon the heirs declared by the various provisions takes place immediately on the death of the owner and it is in no manner controlled or affected by the fact of postponement or absence of actual physical partition of the property. The share of each heir becomes vested in him and if the heir dies before such partition his or her share will pass to and become vested in such persons, as are his or her heirs. Succession cannot, under any circumstances, remain in abeyance in expectation of the birth of a preferential heir, where such heir was not conceived at the time of the owner's death.³⁰ Where, under this Act, the estate of a Hindu has been vested in a person as his heir at the time of his death, it cannot be divested except by the birth of a preferable heir who was conceived at the time of his death.³¹

SPES SUCCESSIONIS

The right of a person to succeed as heir on the death of a Hindu is a mere *spes successionis*, that is, a bare chance of succession. It is not a vested interest; he cannot, therefore, make a valid transfer of it. For the same reason, any agreement entered into by him in respect of the inheritance cannot bind persons who actually inherit when the succession opens.

³⁰ Section 20.

³¹ Ibid.

5. Act not to apply to certain properties.—This Act shall not apply to—

- (i) any property succession to which is regulated by the Indian Succession Act 1925 (39 of 1925), by reason of the provisions contained in section 21 of the Special Marriage Act 1954 (43 of 1954);
- (ii) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act;
- (iii) the Valiamma Thampuran Kovilagam Estate and the Palace Fund administered by the Palace Administration Board by reason of the powers conferred by Proclamation (IX of 1124), dated 29th June 1949, promulgated by the Maharaja of Cochin.

The Act specifically excludes certain properties from the application of the Act as regards succession.

It necessarily follows from s 2, read with this section, that the Act applies to all the property of a deceased Hindu who dies after the commencement of the Act, except property expressly excluded from its operation. Thus, for instance, the Act applies inter alia to agricultural lands.³² Sub-section (2) of s 4 saves from the operation of the Act, only certain matters mentioned there and does not affect the question of succession to agricultural lands. The Act is not ultra vires on the ground that it governs succession to agricultural lands.³³

It also follows from s 3 read with this section that the provisions of the Act also apply to succession to impartible property. Reference may be made to notes under cll (ii) and (iii) below.

CLAUSE (I)

The clause reaffirms that succession to property of Hindus whose marriage is solemnised under the Special Marriage Act 1954, and to the property of the issue of such marriage is regulated by s 21 of that enactment, and not by any provision of this Act. It has been held by the High Court of Madras that this clause deals only with succession, and does not in any way injunct a Hindu father from treating a legitimate son of his born in lawful wedlock as per the Special Marriage Act as an undivided member of the Hindu Joint Family. There are some observations in that decision about creation of a

³² *Laxmi Devi v Surendra Kumar* AIR 1957 Ori 1, also see notes under s 4: 'Agricultural land'.

³³ *Sant Ram Dass v Gurdev Singh* AIR 1960 Punj 462, also notes under s 14 *post*.

joint family by a father as his option, the correctness of which may be doubted.³⁴

See notes under s 4 on 'Overriding effect of the Act'.

CLAUSES (II) AND (III)

There are, as can be seen, exclusionary clauses which set down certain exceptions to the applicability of the Act. These sub-clauses stipulate that in cases where the estate descends to a single heir by virtue of the rule of lineal descendancy, the Act has no application. In cases of estates of a ruler of an Indian State, succession to which is governed by a covenant or agreement with the Government of India, before the commencement of this Act, the Act would not apply. Further, if any enactment before this Act laid down the mode of succession, which was prior to the commencement of the act, such prior enactment would govern the mode of succession to the exclusion of the Act. Succession in the above circumstances, would be governed by such a covenant or agreement in the case of non-state private properties of such ruler.³⁵ The Act thus lays down certain exclusions as to its applicability by virtue of the above stipulations. However, the Supreme Court had occasion to examine the issue as to whether customary succession was covered under the exclusionary clauses set out in the section, with reference to a prior legislation which saved the customary succession prevalent in certain areas, without laying down that the estate would descend to a single heir.³⁶

On an analysis of the provisions of the said enactment, the court held that the enactment merely saved the prevalent custom of lineal descendancy but did not state that the devolution would be as per the rule of primogeniture or lineal descendancy. Therefore, s 5(ii) would not cover such a custom. For the law, relating to succession to impartible property prior to the commencement of the present Act reference may be made to §§ 590–594 [Vol I].

The exception is limited only to the impartible estates of rulers of Indian States, succession to which is regulated by special covenants or agreements and to estate, succession to which is regulated by any previous legislation, and the Estate and Palace Funds mentioned in sub-s (iii).

Succession to any other impartible estates except those mentioned in (ii) and (iii) of this section would be governed by this Act and not by the rule of primogeniture, as the same would stand abrogated by virtue of their exclusion from the above two categories of estates.

³⁴ *Rosa Marie v Wealth Tax Commr* AIR 1970 Mad 249.

³⁵ *Shantadevi Pratapsingh v Sangramsingh Pratapsingh* AIR 1996 Guj 72. *Jagatsingh v Bhawani Singh* AIR 1996 Del 14.

³⁶ *Bhatya Ramanuj v Lalu Maheshanuj* AIR 1981 SC 1937.

6. Devolution of interest in coparcenary property.— (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

- (a) by birth become a coparcener in her own right in the same manner as the son;
- (b) have the same rights in the coparcenary property as she would have had if she had been a son;
- (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidated any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of subsection (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

- (a) the daughter is allotted the same share as is allotted to a son;
- (b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and
- (c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson

or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect—

- (a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or
- (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.—For the purposes of clause (a), The expression “son”, “grandson” or “great-grand son” shall be deemed to refer to the son, grandson or great grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.—For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court.

DEVOLUTION OF INTEREST IN MITAKSHARA COPARCENARY PROPERTY—AFTER THE AMENDMENT OF 2005

The erstwhile s 6 has been left intact with the commentary below, for reference to the earlier law and also considering that the applicability of the new section is prospective.

The law as regards a joint Hindu family, governed by Mitakshara law, was not uniform in India. Several states like, Andhra Pradesh, Tamilnadu, Karnataka and Maharashtra had made changes in the Act, so as to extend equal rights to daughters in a Mitakshara coparcenary.

Before commenting on the new section, it would be apposite to mention that the general principles of inheritance have been discussed in volume I. Any reference to such principles would now have to be read in conjunction with the present amendments, which to a large extent, abrogate the principles of inheritance and pious obligation for debts of ancestors mentioned in volume I.

By virtue of the new provision, a daughter of a coparcener in a joint Hindu family governed by the Mitakshara law now becomes a coparcener in her own right and thus enjoys rights equal to those hitherto enjoyed by a son of a coparcener. The implications of this fundamental change are

wide. Since a daughter now stands on an equal footing with a son of a coparcener, she is now invested with all the rights, including the right to seek partition of the coparcenary property. Where under the old law, since a female could not act as *Karta* of the joint family, as a result of the new provision, she could also become *Karta* of the joint Hindu family.

The subject of a Mitakshara coparcenary in volume I would thus now have to be read as including a daughter as a coparcener in her own right.

The legislature has added a proviso to sub-s (1), providing that any dispositions or alienations, including a partition or testamentary disposition, entered into before 20 December 2004 are not affected. This proviso has been added with the object of making the new provision prospective.

Sub-section (2)

This sub-section stipulates that any property to which a female Hindu becomes entitled, under sub-s (1), would be held by her with all the incidents of coparcenary ownership. Notwithstanding anything contained in the Act or any other law, such property could be disposed off by such female by testamentary disposition. The section is limited only to coparcenary property and not to 'any property'. This is as a result of the reference to property as mentioned in sub-s (1), thus limiting the section to coparcenary property to which such female Hindu is entitled. Reference is drawn to s 30, which stipulates the right of a Hindu to dispose off by testamentary disposition 'any property', which also includes his or her share in Mitakshara coparcenary property which such Hindu is capable of disposing off. This section has also now been amended so as to include a female Hindu.

Though the section has been substituted by emphasising the right of a daughter as a coparcener, this sub-section stipulates the right of any female Hindu over coparcenary property. In the eventuality of a partition of the property, apart from the sons or daughters of a coparcener getting a share in the property of the deceased coparcener, the wife of such coparcener would also be entitled to a share as his widow. The entitlement of a wife of a coparcener to claim her right in the property is in no way abrogated. Attention is invited to the decision of the Supreme Court in *Gurupad v Hirabai*, *infra*, and the commentary there under. The share of the widow would not get reduced, as even under the present law, such widow is entitled to an equal share as that of her sons and daughters in the coparcenary property. Such widow can also dispose off her share by testamentary disposition.

Sub-section (3)

The new provision, while retaining succession to the property by either testamentary or intestate succession, has however, brought about a radical change. The sub-section now stipulates that on the death of such coparcener,

there shall be a deemed division of the property to which such coparcener is entitled, as if a partition had taken place. A notional partition and division has been introduced by way of a deeming fiction. A further change is that, upon such notional partition, the property referred to in the sub-section would be notionally divided amongst the heirs of the deceased coparcener, the daughter taking a share equal to that of a son, the share of the pre-deceased son or a pre-deceased daughter being allotted to the surviving child of such heirs. Such an eventuality has also been introduced in the case of the child of a pre-deceased child of a pre-deceased son or daughter.

The section is limited to the interest of a coparcener in property of a joint Hindu family, governed by Mitakshara law.

Explanation

The explanation to this sub-section had also been incorporated as explanation I to the old s 6, as it existed prior to the new section. Reference is, therefore, invited to the commentary under the old section under explanation I. That commentary will now however, have to be read with the added qualification that certain specified heirs have been mentioned as having specific rights in the property of the deceased coparcener. The explanation thus acquires a different complexion, read in conjunction with the new provision. The explanation has to be read along with the concept of a deemed division of the property of the deceased coparcener, as has been introduced in sub-s 3. The explanation specifies that the share of a coparcener is deemed to be the share that would have been allotted to him as if a partition had taken place immediately prior to his death, irrespective of such coparcener's right to claim partition.

Sub-section 4—Pious Obligation

The doctrine of pious obligation is peculiar to Hindu law. The subject has been dealt with in chapters XIV and XV of volume I. Reference is therefore invited to the commentary under those chapters. The new sub-section states that, after the commencement of the amendment, no court shall recognise the right of a creditor to proceed against the son, grandson or great-grandson of a debtor, for debts contracted by the father, grand-father or great-grandfather solely on the ground of pious obligation. The proviso to the sub-section stipulates that the right of a creditor to proceed against the specified heirs, or any alienations made in respect of, or in satisfaction of any such debts or obligations, before the coming into force of the amendment, are protected. An explanation has been added to the effect that the expressions 'son', 'grandson' or 'great-grandson' would be deemed to refer to such specified heirs who were born or adopted prior to the

commencement of the amendment.

The doctrine of pious obligation thus stands abrogated to the extent that the specified heirs are not liable to satisfy such debts solely on the ground of pious obligation. The meaning and consequence of the amendment is that, if a debt has been contracted by the specified ancestor, the specified heirs are not under any obligation to satisfy the debt on the ground of pious obligation alone. If however, such heir has expressly agreed to bind himself to fulfill the obligation, the provision will become redundant and inoperative. Debts contracted before the amendment came into force have been taken out of the purview of the amendment, with the stipulation that such debts are left untouched and are enforceable as against the specified heirs, by virtue of the proviso to the sub-section. The explanation to the sub-section states that a 'son', 'grandson' or 'great-grandson' mean and include such specified heirs as are born or adopted prior to the commencement of the amendment. Therefore, specified heirs born or adopted after the coming into force of the amendment seem to have been impliedly excluded from the liability of pious obligation, since the section is prospective and only protects the rights of creditors for debts contracted prior to the coming into force of the amendment and preserves the rights of creditors to proceed against the specified heirs.

Sub-section 5—Partition

This sub-section states that nothing contained in this section shall apply to a partition effected before 20 December 2004. The section is prospective and any partition before the specified date has been left unaffected. Thus, only a partition that takes place after the specified date is governed by the provisions of this section, since any partition that is effected after the amendment has to be in conformity with the new provision. The explanation to the sub-section stipulates that for the purposes of the section, a partition takes within its sweep any partition that has been effected by execution of a deed of partition, duly registered under the Registration Act 1908, and also a partition effected by a decree of a court.

Section 6 previously read as follows:

6. Devolution of interest in coparcenary property.—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left surviving him a female relative specified in Class I of the Schedule or a male relative, specified in that class who claims, through such female relative, the interest of the deceased in Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.—For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

The section may be read with ss 8 and 30 of the Act.

DEVOLUTION OF INTEREST IN MITAKSHARA COPARCENARY PROPERTY

This provision of the Act deals with the question of coparcener in a Mitakshara coparcenary dying (after the coming into operation of this Act) without making any testamentary disposition of his undivided share in the joint family property. Under the old law, a devise by a coparcener in Mitakshara family of his undivided interest was wholly invalid. However, now s 30 of this Act has the effect of laying down that it is competent for a male Hindu in a Mitakshara coparcenary to dispose off by will his interest in the coparcenary property. No question of the application of any of the rules laid down in this section can, therefore, arise where there is testamentary

disposition by a male Hindu of his interest in the coparcenary property. Testamentary disposition of all his property by any such person would now, under s 30, include his interest in the coparcenary property. Nor can the question of applying this section arise in case of a sole surviving coparcener who cannot obviously be said to have died, 'having at the time of his death an interest in a Mitakshara coparcenary property'.³⁷ Nor can the question of applying this section arise in case of a person who is not a coparcener in any coparcenary at the time of his death. Such, for instance, would be the case where a person dies leaving a daughter and a separated son. His property, though vested in him on partition, will go by succession under s 8 to the daughter and the separated son. (See Illust (2) under Expl II).

It must be noticed that this section does not purport to affect the law relating to joint family and joint family property except to the limited extent to which it modifies the same. Reference may be made to notes under ss 4 and 8.

The section, although it deals with succession has a bearing on other branches of Hindu law such as joint family, adoption, and maintenance and lays down rules of far-reaching consequences. It prescribes that where a coparcener dies, Mitakshara coparcenary will not become disrupted but the surviving coparceners may continue to remain as members of the joint family without arriving at any partition and subject to the important proviso engrafted on the rule. The undivided interest of any coparcener in the coparcenary property will, on his death, devolve by survivorship upon the surviving coparceners.

It may be appropriate to draw attention to certain general principles of inheritance governing the old law before stating the object and effect of the rules laid down in this section and the far-reaching changes brought about by it. Mitakshara recognises two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applies to joint family (coparcenary) property; the rules of succession apply to property held in

³⁷ *Arunachlathammal v Ramachandram* AIR 1963 Mad 255, affirmed in appeal by the Supreme Court (unreported judgment dated 20 February 1970).

absolute severalty. Dayabhaga recognises only one mode of devolution, namely, succession. It does not recognise the rule of survivorship even in the case of joint family property. The reason is that while every member of a Mitakshara coparcenary has only an undivided interest in the joint property, a member of a Dayabhaga joint family holds his share in quasi-severalty, so that it passes on his death to his heirs, as if he was absolutely seized thereof, and not to the surviving coparceners as under the Mitakshara law. The essence of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a definite share, that is, one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family. It is only on a partition that he becomes entitled to a definite share. No female can be a coparcener under Mitakshara law. Even a wife is not her husband's coparcener. Nor is a mother a coparcener with her sons.

It was generally felt that radical reform was required in Mitakshara law of coparcenary and that where one of the coparceners died it was necessary that, not only in case of his separate property, but also in respect of his undivided interest in the coparcenary property, there should be equal distribution of that share between his male and female heirs and particularly between his son and daughter. Some of the indicia of the ancient joint family system had become extinct in consequence of inroads made upon the coparcenary inter alia by liberal interpretation of texts relating to partition by rules founded on equitable considerations affecting payment of debts incurred personally by any member of the coparcenary, and by the Hindu Woman's Rights to Property Act 1937, which conferred new rights on the widows of coparceners. The highest authorities on Hindu law took the view that Mitakshara coparcenary had lost a number of its characteristics and should therefore, be abolished. The power of free disposition of property is recognised in every system of law and it was time for Hindu law to fall

in line. Probably the best solution would have been to assimilate Mitakshara into Dayabhaga in this respect. This could also have had the merit of equable treatment of the nearest female heirs of coparcener and of bringing about uniformity in the law in all parts of India, but there was some strong sentiment in favour of the retention of Mitakshara coparcenary even in an attenuated form and the rules laid down in this section are a compromise, having some of the merits and all the demerits which attend such adjustive legislation.

Cases can be imagined where the rules laid down in the section and the Proviso and Expl I will raise some problems which may not admit of logically consistent answers and some anomalous situations and varying consequences are bound to result.

‘...SHALL DEVOLVE BY SURVIVORSHIP’

The initial part of the section stresses that the Act does not interfere with the special rights of those who are members of Mitakshara coparcenary, except to the extent that it seeks to ensure the female heirs and daughter's son specified in Class I of the Schedule, a share in the interest of a coparcener in the event of his death, by introducing the concept of a notional partition immediately before his death and the carving out of his aliquot share in the coparcenary property as of that date. The section proceeds first by making provision for the retention of the right by survivorship, and then engrafts on that rule the important qualification enacted by the proviso. The proviso operates only where the deceased has left, surviving him a daughter's son or any female heir specified in Class I of the Schedule.

Illustrations

- (a) *A* and his son *B* are members of a Mitakshara coparcenary. *A* dies intestate leaving, surviving him, his only son *B*. His undivided interest in the coparcenary property will devolve upon *B* by survivorship as clearly envisaged in the initial part of the section and not by succession. There is no question here of the proviso being attracted since, *A* did not leave surviving him any other relative mentioned in the proviso.
- (b) *A* and his sons, *B* and *C*, are members of a Mitakshara coparcenary. *A* dies intestate leaving surviving him his two sons, who continue to be members of the joint family. *A*'s undivided interest in the coparcenary property will devolve by survivorship upon *B* and *C* and his separate property will devolve by succession upon *B* and *C* in equal shares in accordance with the rules laid down in ss 8–10. The position will be similar, if the coparcenary had consisted of *A*, his son *B* and the son or a grandson of a predeceased son *C*.

- (c) In case of Illustrations (a) and (b) above it is now competent for A to dispose of by will, in any manner he likes, his interest in the coparcenary property.

The language of this section makes it amply clear by the use of the words 'his interest in... shall devolve by survivorship upon the surviving members', make it clear that reference to devolution by survivorship is in context of the deceased coparcener's interest. These words, if read in conjunction with Explanation I, are indicative of the fact that there would be no disruption of the joint status of the other coparceners and that the surviving coparceners remain joint till an actual partition takes place.³⁸

PROVISO

The proviso to the section confers new rights upon the specified female heirs and the predeceased daughter's son of a deceased coparcener and superimposes upon the integrated structure of the law relating to Mitakshara coparcenary, a rule intended to be remedial and beneficial. In cases falling under the proviso the interest of the deceased coparcener, if he died without making a testamentary disposition of the same, devolves by intestate succession upon the persons who are among the twelve preferential heirs specified in Class I of the Schedule.³⁹ They inherit that interest simultaneously (s 9) and take it as tenants-in-common and not joint tenants (s19 (b)). The son and daughter mentioned in Class I of the Schedule include an adopted son and an adopted daughter. The other heirs specified in Class I include the widow of the deceased intestate and persons related to the intestate by blood, as also those related to him by adoption.⁴⁰

The son and daughter mentioned in Class I of the Schedule include children of a void or voidable marriage who are, by the operation of s 16 of the Hindu Marriage Act 1955, deemed to be legitimate children of their parents.

It is obvious that the expression 'surviving' in the proviso qualifies both the expressions 'female relative' following. It is also obvious that the expression 'claims through such female relative' means one who traces relationship through a female relative mentioned in Class I of the Schedule. The only male relative specified in Class I and who claims through a female relative in the context of the proviso, is the daughter's son, that is, son of a

38 *State of Maharashtra v Narayana Rao* AIR 1985 SC 716; *Commr of Agricultural Income Tax v Chillikhan Parmeswara Bhatt* 1980 Tax LR 1456 (Ker); *Shivagonda Patil v Director of Resettlement* AIR 1992 Bom 72.

39 *Elambilakkat Chandrasekharan v Moroth Seethamani* AIR 1991 Ker 408 (daughter being a preferential heir along with the son she is entitled to a share.); *Lakshmi Narayan Tudu v Smt Basi Majiban* AIR 2004 Jhar 121 (in case there are female heirs in class I, property would devolve by inheritance and not by survivorship).

40 See 'Relative by adoption'.

predeceased daughter of the male Hindu on whose death the devolution takes place.⁴¹

Since a daughter traces her relationship with the father as an heir of the First Schedule, even if the father gives a small gift of property to the daughter during his lifetime, such a gift would in no way exclude the daughter from claiming a share in the property on her father's death. The right of succession being absolute under the Act, there is no scope for introduction of any anterior principle restricting such a right of inheritance.⁴²

The rule laid down in the initial part of the section comes attended with qualifications and by other rules no less important and it is in the light of the proviso and the explanations and the rules of coparcenary law which are not abrogated, that the section must be construed. The rule of construction to be adopted should be that, which best harmonises with the context and promotes in the fullest measure the object of the legislature. Another rule of construction applicable to legislation of the type under consideration is that its proper construction and operation can be determined with reference to conditions and contingencies likely to arise after its commencement, because they could presumably have been within the contemplation of the legislature. Some modification of the coparcenary law as previously applied is obviously intended and it is submitted that in construing the section, the court will give full effect to the rule carved out by the proviso by introduction of the statutory fiction.

It is not necessary for the proviso to come into operation that the deceased coparcener should have himself been competent to claim partition. Thus, for instance, the proviso will apply to the case of a minor coparcener. (See §§ 307–08, Vol I.)

Analogous considerations arose when the Estate Duty Act 1953, was on the anvil. Under Mitakshara there is no inheritance in case of joint family property, because in case of death of a coparcener there is only devolution of property by survivorship. Evidently such property could not be excluded from the operation of the Estate Duty Act and it is laid down there that for the purpose of taxation the interest of a deceased coparcener should be treated as if his interest in the coparcenary property, had been separated from the rest of the coparcenary property just prior to his death. That precedent has been followed in enacting the present rule.

The section deals with devolution of undivided coparcenary interest of a male Hindu coparcener dying (after the Act) intestate in a Mitakshara Joint Family (see s 8). It does not deal with the devolution by inheritance of the separate property of a male Hindu. Nor does it deal with devolution by inheritance of the property of a female Hindu, which is governed by ss 15

⁴¹ *Ranganathan v Annamalai Chettiar* AIR 1968 Mad 65.

⁴² *Meenakshamma v MC Nampundappa* AIR 1993 Kant 12 (daughter being specified heir entitled to share).

and 16 of the Act.⁴³ This section and the proviso along with s 8 of the Act would be inapplicable in cases of the rule of primogeniture mentioned in s 5(ii) of the Act.⁴⁴

Explanation I.—Explanation I defines the expression ‘the interest of the deceased in Mitakshara coparcenary property’ and incorporates into the subject the concept of a notional partition. It is essential to note that this notional partition is for the purpose of enabling succession to and computation of an interest, which was otherwise liable to devolve by survivorship, and for the ascertainment of the shares in that interest of the relatives mentioned in Class I of the Schedule. Subject to such carving out of the interest of the deceased coparcener, the other incidents of the coparcenary are left undisturbed and the coparcenary can continue without disruption. A statutory fiction which treats an imaginary state of affairs as real, requires that the consequences and incidents of the putative state of affairs must flow from, or accompany it as if the putative state of affairs had in fact existed⁴⁵ and effect must be given to the inevitable corollaries of that state of affairs. But the operation of the notional partition and its inevitable corollaries and incidents is to be only for the purposes of this section namely, devolution of interest of the deceased in coparcenary property and would not bring about total disruption of the coparcenary as if there had, in fact, been a regular partition and severance of status among all the surviving coparceners. It has been appropriately said that legal fictions have legal frontiers. The Supreme Court has pointed out in a number of decisions that a legal fiction should not be extended beyond its avowed purpose.⁴⁶

A question of some importance, which has at times arisen, is whether this notional partition is to have the effect not merely of bringing about devolution of succession of the interest of deceased coparcener in a Mitakshara family, but goes further and results in a partition among all the members who would be entitled to a share in the coparcenary property when a regular partition takes place, that is to say, results in determining and vesting in them their aliquot shares, and brings about severance of status among the surviving coparceners. Thus, for instance, where a deceased coparcener leaves a widow and two sons surviving him, will the notional partition have the effect of vesting in the widow her aliquot share in the interest of the deceased (which would work out at one-twelfth of the coparcenary property), but also of vesting in her and the two sons one-fourth share each in the

43 *Savitri Amma v Devaki Amma* AIR 1982 Kant 67.

44 *Shrimant Rajmata Vijaya Raje Scindia v Jyotirdaya Scindia* AIR 1993 MP 184.

45 See observations in *State of Bombay v Pandurang* [1953] SCR 773, 778–79. Reference may also be made to the oft-quoted dictum of Lord Asquith in *East End Dwelling Co Ltd v Finsbury Borough Council* [1952] AC 109.

46 *State of Travancore-Cochin v Shanmugha Vilas Cashew Nut Factory* [1954] SCR 53, 81–82; *Bengal Immunity Co Ltd v State of Bihar* [1955] 2 SCR 603, 646; *Controller of Estate Duty v S Harish Chander* (1987) 167 ITR 230 (there must be a coparcener for the fiction to operate).

coparcenary property as would happen if the result is to be a complete partition brought about by the sons (under schools other than the Madras, the wife or widow mother gets an equal share on partition among father and sons or among sons after death of the father)? There were divergent and conflicting opinions expressed in judgments of some High Courts on the question of the extent and operation of the statutory fiction incorporated in Explanation I.⁴⁷ The Supreme Court has held in *Gurupad v Hirabai*,⁴⁸ that the widow's share must be ascertained by adding the share to which she is entitled at a notional partition during her husband's lifetime and the share which she would get in her husband's interest upon his death. *K*, who was a member of Mitakshara coparcenary (in State of Bombay) consisting of himself and his two sons *G* and *S* died, leaving his widow *H*, the two sons, and three daughters surviving him. In a suit for partition by *H* in the above-mentioned case it was held by the Supreme Court that she was entitled to seven-twentyfourth share of the coparcenary property, one-fourth, on the footing of partition between the husband and the two sons, in addition to one-twentyfourth share as an heir of *K* as visualised in the proviso and Explanation I. It was observed:

What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the shares of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages... All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased.

⁴⁷ *Sushilabai v Narayanrao* AIR 1975 Bom 257 (FB) (partition suit—mother of a deceased coparcener—case-law examined); *Rangubai v Laxman* AIR 1966 Bom 169; *Gorindram v Chetumal* AIR 1970 Bom 251; *Ananda v Haribandhu* AIR 1967 Ori 194 (case of more than two coparceners); *Vidyaben v Jagdishchandra* AIR 1971 Guj 23. Contra, observation in *P Gorinda Reddy v Golla Obulamma* AIR 1971 AP 363 (FB); *Neelanga v Ramaswami* AIR 1973 AP 58; *Kanahaya Lal v Jumna Devi* AIR 1973 Del 160 (more than two coparceners); *Chandradatta v Sanatkumar* AIR 1973 MP 169; *Venkateswara v Luis* AIR 1964 Ker 125 (FB); *Commissioner of Income tax v Nagarathnamma* (1970) 76 ITR 352 (joint family will continue but diminished to the extent of the share of the deceased coparcener); *Commissioner of Wealth tax v Kantilal* (1973) 90 ITR 289. *Commissioner of Agricultural Income-tax v Chullikkan Parameswara Bhat* (1980) 125 ITR 28.

⁴⁸ AIR 1978 SC 1289. Cf. *Balakrishna Menon v AC of Estate Duty* AIR 1971 SC 2392; *Neelamma v Basappa* AIR 1982 Kant 126.

The above observations have to be read in the context of the facts of the case and of the extent of the rights of a widow in any such case where the court has to ascertain her share in the coparcenary property. The decision of the Supreme Court does not say that the fiction and notional partition must bring about total disruption of the joint family, or that the coparcenary ceases to exist even if the deceased was survived by two coparceners. It is submitted that the notional partition need not result in total disruption of the joint family. Nor would it result in the cession of coparcenary. Of course, there can be no question of a coparcenary continuing after the death of one of the coparceners, if it constituted of only two coparceners, for there must be at least two surviving coparceners if the coparcenary is to continue without disruption.

Attention is also invited to the undermentioned decision⁴⁹ where shares were calculated on the basis of the proviso to this section and where it was held that s 8(1)(d) of the Mysore Hindu Law Womens' Rights Act was superseded to the extent of the proviso to this section.

In *State of Maharashtra v Narayan Rao*,⁵⁰ the Supreme Court carefully considered the above decision in *Gurupad's* case and pointed out that *Gurupad's* case 'has to be treated as authority (only) for the position that when a female member who inherits an interest in joint family property under s 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to both the interest she has inherited and the share which would have been notionally allotted to her as stated in *Explanation I* to s 6 of the Act.' It was also pointed out that 'a legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted but it cannot be carried beyond that. There is no doubt that the right of a female heir to the interest inherited by her in the family property, gets fixed on the date of the death of a male member under s 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision.' It was also pointed out in this later decision of the Supreme Court that the decision in *Gurupad's* case 'has to be treated as an authority (only) for *Explanation I* to s 6 of the Act'. The decision of the Supreme Court in *Raj Rani v Chief Settlement Commissioner, Delhi*⁵¹ may also be read in the light of what has been set out above.

49 *Thimmaiah v Ningamma* AIR 2000 SC 3529 (relevant case law discussed).

50 AIR 1985 SC 716, 721; *Commr of Agricultural Income-Tax v Chillikban Parameswara Bhat* supra; *GV Kishan Rao v State of Andhra Pradesh* AIR 1987 AP 239 (*Gurupad's* case applied).

51 AIR 1984 SC 1234 (Proceedings under Displaced Persons Compensation and Rehabilitation Act).

Illustrations

- (m) *A* governed by Mitakshara School, and his son *B* and *C* a son of *A*'s predeceased son *X* were coparceners in a joint Hindu family, owning coparcenary property, when *A* died intestate in 1958 (after the Act came into force) leaving only *B* and *C* surviving him. *A*'s undivided interest in the coparcenary property will devolve by survivorship upon *B* and *C*. The proviso will not be attracted.
- (n) *A* and his sons, *B* and *C*, are members of a Mitakshara coparcenary. *A* dies intestate in 1958 leaving surviving him his widow *A1* and his two sons. *B* and *C* continue to be members of the joint family. *A*'s undivided interest in the coparcenary property will not devolve by survivorship upon *B* and *C*, but will devolve by succession upon *A1*, *B* and *C* and their shares in it will be equal in accordance with the rules laid down in ss 8–10. The position will be similar if in addition to *B* and *C* the deceased has left surviving him, a daughter or a predeceased daughter's son or any other female relative specified in Class I of the Schedule of heirs. Such other relative for instance may be mother, daughter or daughter of a predeceased daughter or daughter of a predeceased son.

Also see the Illustration below.

- (o) *A* and his son *B* are members of a Mitakshara coparcenary. *A* dies intestate in 1958 leaving surviving him his widow *A1*, son *B*, two daughters *D1* and *D2* and *DS*, the son of the predeceased daughter. *A*'s undivided interest in the coparcenary property will not devolve upon *B* by survivorship but will devolve by succession upon *A1*, *B*, *D1*, *D2* and *DS* in equal shares in accordance with the rules laid down in ss 8–10.
- (p) *A* and his sons, *B* and *C*, were members of a Mitakshara coparcenary. *C* took his share of the joint property and separated himself from the family, and *A* and *B* continued to be joint. *A* dies intestate in 1958 leaving, surviving him, a daughter *D* and his two sons. *A*'s undivided interest in the coparcenary property will not devolve upon *B* by survivorship, but will devolve by *B* and *D*. Although *B*, *C* and *D* are the heirs of *A* according to s 8 read with Class I of the Schedule, *C* having separated from the coparcenary is not entitled to a share in the interest of *A* in the coparcenary of which *A* and *B* had continued to be members (Explanation II). If however, *A* has left any separate or self-acquired property it will devolve by succession upon *B*, *C* and *D* in equal shares notwithstanding *C*'s separation from the joint family. Under the old law *C* would not have been entitled to claim any share even in the separate or self-acquired property of *A*.

(See §§ 43 and 341 (Vol D).)

COMPUTATION OF THE INTEREST OF THE DECEASED COPARCENER AND THE INTEREST OF HIS WIDOW

The undivided share of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as on the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such persons would have to be ascertained according to the law of joint family and partition. The rules of Hindu law on the subject in force at the time of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition.

The quantum of the share to be allotted to the heirs of the deceased coparcener will be on the footing of the coparcenary property existing at the date of his death, when the partition is deemed to have taken place and not the property as it may exist at the date of the actual allotment and delivery of that share to the heirs. The heirs would not be subject to the hazard of the fluctuations in the fortunes of the family between the two dates⁵² unless of course, any agreement or unequivocal conduct of the parties has given rise to some special equities between them.

Illustrations

- (1) In Illustration (n) above, it is stated that *A*'s undivided interest will devolve by succession upon his widow *A1* and his two sons *B* and *C*. That share of *A* will have to be computed according to the law of partition applicable to the parties on the date of *A*'s death. If a partition had in fact taken place immediately before his death *A*, in all States except Madras, would have been entitled to one-fourth of the property, since *A1*, the wife, would have become entitled to receive a share equal to that of a son and the property would have been divided in four parts. That one-fourth interest of *A* will therefore devolve by succession upon *A1*, *B* and *C*. In all States other than Madras *A1* will become entitled to one-twelfth of the entire coparcenary property as one of the heirs of *A* in addition to the one-fourth share as laid down in the Supreme Court decision in *Gurupad's* case. In Madras the wife does not get any share on a partition between her husband and her sons. So on the death of *A* she will be entitled to one-ninth only of the entire property because on partition, *A*'s share would have been one-third and not one-fourth of the property (by virtue of the proviso).

⁵² *Karuppa Gounder v Palaniammal* AIR 1963 Mad 245.

- (2) If in the illustration above *A* has not left a widow but a daughter or any other female relative specified in Class I of the Schedule of heirs or a predeceased daughter's son, *A*'s interest will be computed as one-third, and it will in all States devolve by succession upon such relative or relatives and the two sons, *B* and *C*. The division of this one-third interest will be in accordance with the rules laid down in ss 8, 9 and 10.

SUBSEQUENT PARTITION BETWEEN SURVIVING COPARCENERS

The effect of the proviso is that any of the female heirs and a daughter's son specified in the proviso read with Class I of the Schedule can claim to succeed not only to the separate or self-acquired property, but also to the interest of the deceased in coparcenary property. Their shares would be ascertained in accordance with the relevant rules in ss 8–10 and the other general provision of the Act relating to succession. This would be regardless of the fact that for instance the deceased coparcener had left any son, grandson or great grandson. It is only by a fiction of law that a partition is to be deemed to have taken place as regards the interest of the deceased coparcener in any such case and the existence or constitution of the coparcenary *quod* the surviving coparcener is not otherwise affected. Where the surviving coparceners continue as before to be members of the coparcenary and a partition subsequently takes place between them and the joint family property is to be divided, it would become necessary to have regard to the quantum of the share of the deceased coparcener distributed amongst his heirs under the provision. The division, it is submitted, would be on equitable principles (see illustration below).

Illustration

A Mitakshara coparcenary consisted of two brothers, *A* and *B*, and also *A*1, *A*2, and *A*3—the sons of *A*; and *B*1—the son of *B*. *A* died intestate in 1958 leaving, surviving him, his sons *A*1, *A*2 and *A*3, daughter *D* and a predeceased daughter's son *D*8. Thereupon *D* and *D*8 claimed their shares as heirs out of the undivided coparcenary interest of *A* in the joint family property. *A*'s share would have been one-eighth if there had been a partition between him and other members of the coparcenary immediately before his death. *D* and *D*8 became entitled to one-fifth each of *A*'s one-eighth share in the joint family property and they were paid off their aliquot shares. *A*1, *A*2 and *A*3 continued to be joint with *B* and *B*1. Some time thereafter partition takes place between *A*1, *A*2, *A*3, *B* and *B*1. The division will be *per stirpes* and not *per capita*, that is, *B* and

B1 between them will be entitled to half the joint family property in existence at the time of the subsequent partition and *A1*, *A2* and *A3* between them will be entitled to half the property. However, on equitable principles, the amount paid out to *D* and *DS*, it is submitted, will be taken into account as having gone out of the coparcenary property and for which the branch of *B* was not liable.

DEBTS OF A DECEASED COPARCENER

The question of 'Undivided coparcenary interest, when liable for coparcener's debt' has been dealt with in § 289 (see Vol I). When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary, his undivided interest will not devolve by survivorship upon the other coparceners in cases falling under the proviso, that is, if he dies leaving surviving him any of the male or female relatives specified there, but will devolve by succession. If, however, he dies without leaving any such male or female relative his undivided interest will devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act. The law relating to 'Debts' stated in Chapter XIV (Vol I) of this work has not been amended or codified by the new legislation. The present section, however, has some bearing on the subject. Where the undivided interest of a person governed by Mitakshara law is attached in his lifetime in execution of a decree against him for his personal debt, it may be sold after his death, whether the order for sale was made in his lifetime or after his death. However, it cannot be attached after his death (except where the coparcener is the father), for it then ceases to be his interest and passes to the other coparceners by survivorship. It is only an attachment effected during the lifetime of the debtor that will prevent the accrual of his interest to his coparceners by survivorship.⁵³ The effect of the proviso to the present section is that there will be no devolution of the interest of the deceased coparcener by survivorship in cases falling under it. It means that when his interest devolves, by succession, by operation of the proviso the rights of the creditor will not be affected and will be governed by the rule stated in § 288 (see Vol I) which deals with the question of liability of 'heirs' for debts. The position will be different where there is devolution of such interest by survivorship and the rules stated in § 289 (Vol I) will apply. The pious obligation of a son, grandson and great grandson remains the same as stated in Chapter XIV (Vol I) of this work. Explanation I merely enables the ascertainment of the interest of the deceased at the time of his death for the purpose of operation of either survivorship or succession, intestate or testamentary, but does not have the effect of relieving such interest from the burden or obligation to be available for satisfaction of living

⁵³ See § 289 (Vol I).

debts.⁵⁴ The rights of a creditor of the deceased would not be affected. Dayabhaga law of debts is very simple, as pointed out in Chapter XV (Vol I).

JOINT FAMILY BUSINESS CONTINUED AFTER DEATH OF A COPARCENER

The estate which devolves on the classified heirs of the deceased coparcener under the proviso is one which is carved out of the joint family property and becomes the independent and separate property of such heirs. It necessarily follows that neither the surviving coparceners nor the *karta* of the joint family can deal with it without reference to them on the footing that he is continuing the joint family business for the benefit of such heirs along with the members of the joint family. As already pointed out the heirs would not be subject to the hazard of the fluctuations in the fortunes of the family subsequent to the death of the deceased coparcener,⁵⁵ unless some special equities have arisen against them or any of them. Thus for instance, if a debt was incurred by the *karta* of the joint family in conjunction with, and with the consent of such classified heirs, express or necessarily to be implied, then such heirs may become involved. Their involvement or participation may render them liable for the debt. Of course, there would have to be very cogent and convincing proof before any such heir is saddled with such liability.

PARTIES TO SUIT RELATING TO ANY PROPERTY AFFECTED BY THE PROVISO

Where the death of a coparcener takes place in a family falling under the proviso, the female heirs and a predeceased daughter's son (along with other heirs of the deceased coparcener), inherit an interest in the joint family property and that interest becomes vested in them. In such a case, all the persons interested in the property will be necessary party to any suit affecting any property or asset of the family. The eldest male member of the family cannot represent all of them as *karta* of the family.⁵⁶

54 *KM Raghothaman v MP Kannappan* AIR 1982 Mad 235.

55 *Bharat Trading Ltd v P Nachiar Ammal* AIR 1976 Mad 393; *Govinda Reddy v Golla Obulamma* AIR 1971 AP 363 (FB); *Fathimunnisa Begum v T Rajagopalchryudu* AIR 1977 AP 24.

56 *P Govinda Reddy v Golla Obulamma* AIR 1971 AP 363 (FB) (suit on mortgage in favour of joint family); *Govindram v Chotumal* AIR 1970 Bom 251 (suit in respect of monies advanced by deceased *karta* of joint family); *Narayan Prasad v Mutim Kobam* AIR 1969 Cal 69; *Venkateswara v Luis* AIR 1964 Ker 125 (*Karta* cannot represent family where one of the coparceners dies and the explanation applies); *Kashinath Prasad v Kharammath* AIR 1973 Pat 110; *Neelayya v Ramaswami*

continued on the next page

EXPLANATION II: SEPARATED MEMBER

When partition takes place between members of a joint family every coparcener is entitled to a share. However, a partition between coparceners may be partial as for instance, when one coparcener separates from the others and others do not separate, but continue to remain joint or become reunited (§ 328, Vol I). In such a case, on the death of any such coparcener, the proviso will come into operation. The separated member or his heirs cannot claim any share in the interest of the deceased in the coparcenary, he having already gone out of the coparcenary. *Explanation II* is intended to make the position clear. For instance, see the undermentioned case.⁵⁷ Where a Hindu father who had separated from all his sons died, leaving as his heirs (under s 8) his widow, two daughters, one son and heirs of two predeceased sons, it was held that such a case did not fall under the *Explanation II* and the property had to be divided among each set of heir.⁵⁸

The case of a widow of a coparcener (son), who obtained the share of the coparcener on his death after the coming into force of the Act while living in joint status, it was held, would not fall under this *Explanation*. She is not a 'coparcener' within the ambit of the same. She can still institute a suit on the death of the father-in-law and claim a share in his estate.⁵⁹

Illustrations

- (1) A and his sons B and C constitute a Mitakshara coparcenary. B separates himself from the family and takes his one-third share of the coparcenary property. A and C continue to be joint as before. A dies intestate in 1958 leaving surviving him his daughter D and his two sons. On A's death his interest in the coparcenary will not devolve upon C by survivorship, but by operation of the proviso it will devolve by succession upon C and D in equal shares (s 8). B will have no claim for any share in the same. He will, however, be entitled to a share in the separate or self-acquired property left by A. (See Illustration (p) supra).

AIR 1973 AP 58; *Kanahaya Lal v Jumma Devi* AIR 1973 Del 160 (karta son or brother's liability to account); *Shankaramma v Medappa* AIR 1977 Kant 188 (Mysore Act 10 of 1937); *Veerasekhara v Amirhavalliamma* AIR 1975 Mad 51; *Fathimunnisa Begum v T Rajagopalcharyulu* AIR 1977 AP 24 (widow not a necessary party: Hindu Women's Rights to Property Act 1937); *Kashinath v Dharamnath* AIR 1973 Pat 110 (suit to recover rent by father—father dying pending suit); *Raja Man Singh v Ramvishal* (1979) Mad 1J587; *Kastura Sabuni v Das Seth* (1978) Cuttak LT 227.

⁵⁷ *G Appalanaidu v G Narayanamma* AIR 1972 AP 258 seemed to agree with Illustration (1) below.

⁵⁸ *Satyanarain v Rameshwar* AIR 1982 Pat 44.

⁵⁹ *Basavalingamma v Sbaradamma* AIR 1984 Kant 27.

- (2) *A* and his son *B* (by his first wife) constitute a Mitakshara coparcenary. *B* separates from his father and takes his one-half share in the coparcenary property. *A* dies intestate thereafter leaving surviving him his second wife *W*, two daughters *C* and *D* by his first and second wife respectively and his divided son *B*. There being no coparcenary in existence at the death of *A*, this section will have no application and the property left by *A* will devolve by succession under s 8 on *W*, *C*, *D* and the divided son *B* in equal shares.⁶⁰ The Karnataka amendment which introduced daughters as coparceners along with sons is prospective, and if the father died before the coming into force of the amendment, inheritance opening on the death of the father, would be governed by s 6 of the Principal Act and not by s 6A which introduced the state amendment.⁶¹

7. Devolution of interest in the property of a tarwad, tavazhi kutumba, kavaru or illom.—(1) When a Hindu to whom the *marumakkattayam* or *nambudri law* would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a *tarwad*, *tavazhi* or *illom*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *marumakkattayam* or *nambudri law*.

Explanation—For the purposes of this sub-section, the interest of a Hindu in the property of a *tarwad*, *tavazhi* or *illom* shall be deemed to be the share in the property of the *tarwad*, *tavazhi* or *illom*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *tarwad*, *tavazhi* or *illom*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *marumakkattayam* or *nambudri law* applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2) When a Hindu to whom the *aliyasantana* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a *kutumba* or *kavaru*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate

⁶⁰ *Appalamandu v Narayana* AIR 1972 AP 258; also see notes under divided son under s 8 *post*.

⁶¹ *DM Jayamma v Muniyamma* AIR 2000 NOC 80 (Kant).

succession, as the case may be, under this Act and not according to the *aliyasantana* law.

Explanation—For the purposes of this sub-section, the interest of a Hindu in the property of a *kutumba* or *kavaru* shall be deemed to be the share in the property of the *kutumba* or *kavaru*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *kutumba* or *kavaru*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *aliyasantana* law, and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a *sthanamdar* dies after the commencement of this Act, the *sthanam* property held by him shall devolve upon the members of the family to which the *sthanamdar* belonged and the heirs of the *sthanamdar* as if the *sthanam* property had been divided *per capita* immediately before the death of the *sthanamdar* among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the *sthanamdar* shall be held by them as their separate property.

Explanation—For the purposes of this sub-section, the family of a *sthanamdar* shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to succeed to the position of *sthanamdar* if this Act had not been passed.

DEVOLUTION OF INTEREST IN THE PROPERTY OF A TARWAD, TAVAZHI, KUTUMBA, KAVARU, OR ILLOM

The definitions in cl (b), (h) and (i) of s 3 are inserted to facilitate the application of the rules of succession laid down in this Act to persons governed by the *Aliyasantana*, *Marumakkattayam* and *Nambudri* laws. The effect of this section and s 17 is to regulate succession to property of persons hitherto governed by those systems prevalent in certain parts of the South by the simple rules of inheritance laid down in the Act and which keep in view certain features of those systems. This section regulates succession to the interest of an intestate in any property belonging to any of the various kinds of joint families, which are peculiar to the South and west coast of India. In the case of *sthanam* properties which are specially assigned to a senior member of a joint family for the purpose of preserving his dignity, sub-s (3) provides for a notional partition immediately before the death of the *sthanamdar* so that his interest will pass, not by any special rule of descent to a single heir, but in accordance with this law.

As to testamentary succession in case of any such interest, reference may be made to Explanation to s 30 *post*.

Sundara Ayyar J of the Madras High Court has written an excellent treatise on the customary laws of Malabar and south Kanara. His '*Malabar and Aliyasanthana Law*' is recognised as an authoritative work and was referred to by the Privy Council in the undermentioned case.⁶² In view of the fundamental and radical changes brought about in the law by the present enactment it is not deemed necessary to state the previous law on the subject and the reader is referred to the above treatise. The Supreme Court had on occasions referred to some broad aspects of this law in some decisions.

Marumakkattayam law is a body of customs and usages, which have received judicial sanction. It prevails among a considerable section of the people inhabiting the west coast of South India. The essential difference between *Marumakkattayam* and the other schools of Hindu law is that the former is founded on the matriarchate while the latter is founded upon the agnatic family. In Mitakshara joint family the members claim their descent from a common ancestor but in *Marumakkattayam* family, which is known as the *tarwad* the descent is from a common ancestress. Mayne compares a *tarwad* to a family corporation. Every member of a *tarwad* has equal rights in the property because of his birth or her birth in the *tarwad*. It was laid down in a course of judicial decisions in the nineteenth century that one or more members of a *tarwad* cannot claim partition and separate possession of his or her share of the *tarwad* property without the consent or concurrence of all the members of the *tarwad*. The Madras legislature enacted certain statutes giving a right of partition to the members of a *tarwad* to enforce partition of a *tarwad* property. The shares on partition were to be on per capita basis.⁶³

Under the customary *Marumakkattayam* law, no partition of the family estate may be made, but items of the family property may by agreement be separately enjoyed by the members. On death, the interest of a member devolved by survivorship. Management of the family property remained in the hands of the eldest male member, and in the absence of a male member, a female member. A *tarwad* may consist of two or more branches known as *tavazhis*, each *tavazhi* or branch consisting of one of the female members of the *tarwad* and her children and all her descendants in the female line. Every *tarwad* consisted of a mother and her children—male and female living in commensality, with joint rights in property. The customary law was modified in certain respects from time to time by the Madras legislature. There were several legislative measures in the States of Travancore and Cochin also before they merged with the Indian Union. Those statutes

⁶² *Kochunni v Kuttanunni* (1948) PC 47, 53.

⁶³ *Balakrishna Menon v Asst Controller of Estate Duty* AIR 1971 SC 2392.

also made significant changes in the customary law governing the family and property relations between the members governed by the *Marumakkattayam* law.⁶⁴

In the undermentioned case, the Supreme Court⁶⁵ had to examine the questions of property acquired in the name of a junior member of a *tarwad* and the application or otherwise of the rules of presumption in respect of self-acquisition of property by a member.

SUB-SECTION (1)

This sub-section relates to the *Marumakkattayam* and *Nambudri* laws. It gives an enactment parallel to that in s 6 and Explanation I to the same. The expression *tarwad*, *tawazhi*, and *illom* were defined in the relevant enactments mentioned in the definition clauses in s 3 and which enactments are now overridden by operation of s 4 of this Act.

The interest of a deceased member in the property of a *tarwad* would now, by operation of this Act, devolve under this sub-section and not according to *Marumakkattayam* or *Nambudri* law. It must follow that the heirs of such deceased member cannot form a *tarwad* with the rest of its members, and the resultant position would not be that of a newly constructed *tarwad*. In such a case, it has been held, no suit can be brought for possession by any co-owner against the other.⁶⁶ The surviving members and the heirs of the deceased members would hold the family properties as tenants-in-common until a partition takes place.

This sub-section does not affect the rights of parties before a partition. Section 43 of the Travancore Kshatriya Act, in unambiguous terms, confers a right of partition upon all the members of a *Kshatriya Tarwad* since the date of that Act coming into force. The right to partition without the concurrence of others is a valuable right in property which must be available for attachment and sale by the person to whom a debt was due by the deceased member of the *tarwad*.⁶⁷

SUB-SECTION (2)

This sub-section relates to the *Aliyasantana* law. It gives an enactment parallel to that in s 6, and Explanation I to the same. The expressions *Kutumba* and *Kavaru* were defined in the relevant enactment mentioned in the definition clause in s 3 of this Act, and which enactment is now

⁶⁴ *Venugopala Ravi Varma Raja v Union of India* AIR 1969 SC 1094.

⁶⁵ *Achuthan Nair v C Amma* AIR 1966 SC 411.

⁶⁶ *Devki v MV Kumaran* AIR 1977 Ker 110; *Unnikrishna v Kojhikkott* AIR 1972 Ker 198 (heirs of deceased member and an alienee from the deceased).

⁶⁷ *Bank of India v SP Pannamma* AIR 1961 Ker 105 (FB); also see notes under s 30 post.

overridden by operation of s 4 of this Act. The undermentioned decision illustrates the application of this sub-section read with the Explanation to the same.⁶⁸

In the undermentioned case⁶⁹ the Supreme Court referred to the salient features of the *Aliyasantana* law, and examined the scheme of the present Act in the matter of succession generally and particularly in the context of the present sub-section and s 17 of the Act. The sub-section makes it abundantly clear that the provisions relating to succession in the Act would apply in case of succession to *Aliyasantana* Hindus. It was accordingly held in the above decision of the Supreme Court that when a Hindu governed by the *Aliyasantana* law dies possessed of a life-interest, after his death the property devolves under the present Act and not the *Aliyasantana* Act of 1949. It was also held that the undivided interest of the deceased in the property of the *Kutumba* or *Kavaru* would be deemed, by the virtue of the Explanation to the sub-section, to have been allotted to him on partition, as his absolute property.

The surviving members of the family and the heirs of the deceased undivided member would hold the family properties as tenants-in-common until partition takes place and their rights inter se, and against each other would be similar to those of co-owners.⁷⁰

A brief survey of the customary *Aliyasantana* law regarding succession, partition, and devolution of shares will be found in the undermentioned full bench decisions of the High Court of Mysore, and other decisions stated there.⁷¹ The present Act has brought about some important changes in the customary *Aliyasantana* law as modified by Madras Aliyasantana Act 9 of 1949, as pointed out in the undermentioned decision of the High Court of Mysore.⁷² Also see Madras Aliyasantana (Mysore Amendment) Act of 1 of 1962.

Neither under the customary law nor under the Aliyasantana Act 1949, the interest of a coparcener in an *Aliyasantana kutumba* could have been disposed of by a will. In that regard a definite change in the law is made by the *Explanation* to s 30 of the present Act with the result that now a member of an individual *Aliyasantana Kutumba* can dispose of his interest in the *kutumba* properties by a will. However, this does not mean that

68 *Laxmi v Parameshwari* AIR 1969 Mys 175, *Sarada v Chakkunni* AIR 1992 Ker 249.

69 *Sundari v Laxmi* AIR 1980 SC 198.

70 *C Hengsu v R Bontra* AIR 1974 Kant 35, reference may be made to notes under sub-s (1) above (powers of manager in any such case).

71 *Sandara v Ganja* AIR 1962 Mys 72 (FB), *Bhagratbi v Darakke* (1965) 2 Mys 11, 796 (FB).

72 *Ratnamala v State of Mysore* AIR 1968 Mys 216, in *Gommanna v Nagavenamma* AIR 1967 SC 159 the Supreme Court had to examine the Madras Act 9 of 1949, and on construction of a document of 1900 held that it was not a deed of partition but only a family settlement.

otherwise the rights of a divided member have been enlarged. In a case decided by a full bench of the Mysore High Court *kutumba* properties were partitioned and under the preliminary decree, A, a *nissanthathi Kavaru*, obtained a share in the same. Under s 36 (3) of the Madras Aliyasanthana Act 1949, A got a life interest in the properties allotted to him. By a will executed by A, he purported to bequeath the same. The contention that the interest obtained by A under the preliminary decree stood enlarged by the operation of s 30 (1) of the present Act was held to fail.⁷³ In *Jalaja v Lakshmi*,⁷⁴ the Supreme Court agreed with the view taken by the full bench.

SUB-SECTION (3): DEVOLUTION OF STHANAM PROPERTY

This sub-section relates to *sthanam* property and devolution of such property on the death of a *sthanamdar*. The Act does not define the expression *sthanam*, which means⁷⁵ the status and attendant property of senior *rajas*. In Moore's *Malabar Law and Custom*, it is defined as a station, rank or dignity. The holder of a *sthanam* is referred to as a *sthani* or *sthanamdar*. The ancient rules of the Malabar Coast possessed *stanoms* and it may be taken that the lands, which they held as rulers, were regarded as being *stanom* in character. Rulers granted *stanoms* to their subsidiary chieftains and public officers. The grant of a *stanom* to a subsidiary ruler or public officer was usually accompanied by a grant of land for the maintenance of the dignity. In Sundara Ayyar's work, a chapter is devoted to this subject and it is pointed out that in addition to the families of princes and chieftains there were other families possessing *stanoms* without any particular dignity attached to them. In ancient days when a family became opulent and influential, the members of the *tarwad* sometimes agreed to set aside for the *karnavan* certain property in order that he might keep up his social position and influence and this property descended to the next head of the family.⁷⁶

Reference may be made to the decision of the Privy Council⁷⁷ and to the decisions of the Supreme Court in the undermentioned cases.⁷⁸ Reference may also be made to the undermentioned case.⁷⁹

73 *Sundara v Girija* AIR 1962 Mys 72 (FB).

74 AIR 1973 SC 2685.

75 *Malabar and Aliyasanthanam* law.

76 *Kuttan Unni v Kochunni* AIR 1944 Mad 378.

77 *Kochunni v Kuttanunni* AIR 1948 PC 47.

78 *Kochuni v States of Madras & Kerala* AIR 1960 SC 1080; *Balakrishna Menon v Asst Controller of Estate Duty* AIR 1971 SC 2392, *Inspecting Asst Commr v VK Ramunni* AIR 1971 SC 2513.

79 *Sakarappa Gounder v KC Gopalan* AIR 1973 Ker 149 (FB) (s 7(3) as amended by Kerala Act 28 of 1958).

The incidents of the *sthanam* were that the seniormost member of the family became the *sthanamdar* who was usually the male member; but there were instances where the seniormost female member became the *sthanamdar*. Separate properties belonged to each *sthanam* and were vested in the holder of the office for the time being and descended to the successors in office. One important feature was that a *sthanamdar* ceased to have any interest in the property on his death and the members of his *tarwad* had, in their turn, only reversionary rights to the *sthanam* property. The *sthanamdar* had a limited interest in the sense that he could encumber or alienate the *sthanam* property only for a legal necessity like any limited owner but otherwise he was absolutely entitled to the income accruing during his tenure of office. His position was analogous to that of a holder of an impartible estate. His successor had no interest in it and the right of the successor was nothing more than *a spes successionis*.⁸⁰

Now operation of this Act will gradually liquidate all the *sthanams*. The present sub-section regulates the devolution of the *sthanam* property held by a *sthanamdar* who dies after the commencement of this Act. The effect of it is that *sthanams* continue till the death of the *sthanamdar* and thereafter the *sthanam* property devolves upon the members of the family to which he belonged and his personal heirs. The division is to be *per capita* on the basis of a notional partition having taken place immediately before his death. This result, as pointed out by the Supreme Court in *Balakrishna Menon v Asst Controller of Estate Duty* supra, is brought about by the legal fiction enacted in the sub-section. The legal fiction, however, has to be confined for the purpose for which it is enacted and not to be extended further, so as to include an actual division or partition having been effected in the lifetime of the *sthanamdar* with the result that there was a division or partition for all purpose.

8. General rules of succession in the case of males.—The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter—

- (a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;
- (b) secondly, if there is no heir of Class I then upon the heirs, being the relatives specified in Class II of the Schedule;

80 *Balakrishna Menon v Asst Controller of Estate Duty* AIR 1971 SC 2392 confirming *Asst Controller of Estate Duty v Balkrishna Menon* AIR 1967 Ker 210 (FB), *Balkrishna Menon v Inspecting Asst Commr* AIR 1969 Ker 1 (FB) for nature of estate of a *sthanamdar* and also see as to succession to *upasara* property on death of a *Jain Yati*, see *Sumer Chand v State of Rajasthan* AIR 1965 Raj 2.

- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.

SUCCESSION TO PROPERTY OF A MALE DYING INTESTATE

This section propounds a new and definite scheme of succession and lays down certain rules of succession to the property of a male Hindu who dies intestate after the commencement of the Act. The rules are pivotal and have to be read along with the Schedule. They have also to be read with certain other sections (particularly ss 9–13) in the Chapter which contain supplementary provisions which are not merely explanatory, but lays down substantive rules involving legal principles. Section 8–13 contains fascicles of rules, which must be read together. Notes on ss 9–13 are given under those sections.

THE SCHEDULE

(See Section 8)

HEIRS IN CLASS I AND CLASS II

CLASS I

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

CLASS II

- I Father.
- II (1) Son's daughter's son; (2) son's daughter's daughter; (3) brother; (4) sister.
- III (1) Daughter's son's son; (2) daughter's son's daughter; (3) daughter's daughter's son; (4) daughter's daughter's daughter.
- IV (1) Brother's son; (2) sister's son; (3) brother's daughter; (4) sister's daughter.
- V Father's father; father's mother.
- VI Father's widow; brother's widow
- VII Father's brother; father's sister,
- VIII Mother's father; mother's mother.
- IX Mother's brother; mother's sister.

Explanation—In this Schedule, references to a brother or sister do not include reference to a brother or sister by uterine blood.

9. *Order of succession among heirs in the Schedule*—Among the heirs

specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in Class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

10. *Distribution of property among heirs in Class I of the Schedule*—The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules:—

Rule 1—The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2—The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3—The heirs in the branch of each predeceased son or each predeceased daughter of intestate shall take between them one share.

Rule 4—The distribution of the share referred to in Rule 3—

- (i) among the heirs in the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion.
- (ii) among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

11. *Distribution of property among heirs in Class II of the Schedule*—The property of an intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally.

12. *Orders of succession among agnates and cognates*—The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:—

Rule 1—Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2—Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3—Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

13. *Computation of degrees*—(1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

THE FOUR CATEGORIES OF HEIRS

Section 8 groups the heirs of a male intestate into four categories and lays down that his heritable property devolves firstly upon the heirs specified in Class I of the Schedule. They are the son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased

daughter; daughter of predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son. Under the old law in force before 1937, the 'simultaneous heirs' of a male intestate consisted only of the son, the son of a predeceased son and the son of a predeceased son of a predeceased son. This was enlarged by the Hindu Women's Right to Property Act 1937, by adding three more heirs, namely, the widow of the intestate and the widows of the predeceased son and of the predeceased son of a predeceased son. All the six heirs succeeded simultaneously and the doctrine of representation applied to their case.

In Class I of the Schedule, the Act enumerates 12 heirs so as to include in the new scheme of heirs the mother and the daughter of the intestate and some more descendants, the latter by reference to the principle of representation. All these heirs inherit simultaneously. On failure of any such heir specified in Class I, the property devolves upon the enumerated heirs specified in Class II, an heir in the first entry in Class II being preferred to one in the second entry and so on in succession. If there is no heir belonging to Class I or even Class II the property devolves upon the agnates of the deceased. A person is said to be an 'agnate' of another if the two are related by blood or adoption wholly through males. Lastly, if there is no agnate of the deceased in existence at the time of his death the property devolves upon his cognates. A person is said to be a 'cognate' of another if the two are related by blood or adoption, but not wholly through males.

PROPERTY

The expression 'property' in this section means all property of the deceased intestate heritable under the Act. It includes not only his separate or self-acquired property, but his interest in a Mitakshara coparcenary property in case he is survived by any of the female heirs or a daughter's son mentioned in Class I of the Schedule. It also includes property, which he might have inherited from his father or grandfather after the Act came into force. It also includes agricultural land⁸¹ subject to this, that the legislation relating to prevention of fragmentation of agricultural holdings or fixation of ceilings or the devolution of tenancy rights in respect of such holdings is not to be affected by anything contained in this Act. However, the rules of succession laid down in the Act do not apply to the property expressly excluded from the operation of the Act by s 5. As aforesaid, succession to the property of a Hindu dying intestate shall devolve according to the section. This includes not only joint property but self-acquired property as well.⁸²

81 *Laxmi Devi v Surendra Kumar* AIR 1957 Ori 1. Also see notes under s 4: Agricultural Land.

82 *Harbans Singh v Tekamani Devi* AIR 1990 Pat 26.

'...PROPERTY OF A MALE HINDU... SHALL DEVOLVE'

The language of the section and particularly the words 'shall devolve' plainly indicate that the section is prospective in its operation. In *Eramma's* case,⁸³ the Supreme Court has held that the section applies where on death of a male intestate devolution of his property takes place after the commencement of the Act and does not govern succession to the property of a male Hindu whose death took place before the commencement of the Act. In the latter case, all questions of inheritance would be determined according to the previous law.

This does not, however, mean that s 8 cannot have relevance or any application whatever in any case where a male Hindu had died before the commencement of the Act. Thus, for instance, where a Hindu who died in 1933 and his widow who succeeded his estate died in 1963 after the coming into force of the present act but was not then in possession of the estate, the estate would devolve not upon her heirs, but the heirs of her husband. The succession would be decided on the basis of the husband dying on the date of the death of the widow (limited owner) and the heirs of the husband would be those who would have succeeded him had he died on the date of the death of the widow. The heirs would have to be ascertained in accordance with the present section (s 8) and not the old law of succession.⁸⁴ This does not amount to giving retrospective operation to the section. Two propositions are well-established: (1) succession opens on the death of the limited owner; and (2) the law then in force governs the succession.

The words, 'dying intestate' would apply where a male Hindu dies intestate not having made any will or having made an invalid will.⁸⁵

When the status of a coparcenery is abolished under the Kerala Joint Hindu Family System Abolition Act, the property of a male Hindu dying intestate would devolve on his class I heirs in accordance with the provisions of the first schedule.⁸⁶

83 *Eramma v Veerupana* AIR 1966 SC 1879; *Jandebi v Upendra* AIR 1968 Ori 187; *Satyanarayana v Seethamma* AIR 1972 Mys 247; *Kempiah v Girigamma* AIR 1966 Mys 189; *Sampathakumari v Lakshmi Ammal* AIR 1963 Mad 50; *Nathuni Missir v Ratna Kuer* AIR 1963 Pat 337; *Renukha Bala v Aswini Kumar* AIR 1961 Pat 498; *Sheoraj Singh v Munia* AIR 1963 MP 360; *Gopi Chand v Bedamo Kuer* AIR 1966 Pat 231 (no divesting of property already vested). The question may be of particular importance in case of a deceased who was a displaced person; *Raj Rani v Chief Settlement Commr* (1984) 3 SCC 619.

84 *Daya Singh v Dhan Kaur* AIR 1974 SC 665. Reference may be made to notes under s 14, where this case is noted.

85 *Manshan v Tej Ram* AIR 1980 SC 558 (facts of this case will be found in notes under s 4 supra)

86 *Puthiyadath Jayamathy Avva v KJ Naga Kumara* AIR 2001 Ker 38

‘...ACCORDING TO THE PROVISIONS OF THIS CHAPTER’

Chapter II contains a number of provisions which are supplementary to the primary and pivotal rules laid down in this section. The following are the important provisions. The order of succession among the heirs enumerated in Class I and Class II of the Schedule is governed by s 9. The order of succession in case of agnates and cognates, ascertaining the nearest in relationship among them to the deceased, is to be in accordance with the rules of preference and computation of degrees stated in ss 12 and 13. The computation of the shares of the various heirs in the four classes is regulated by the rules laid down in ss 9 to 13. Section 17 contains some special provisions respecting persons governed by *Marumakkattayam* and *Aliyasantana* laws. Section 18 lays down that an heir related by full blood is to be preferred to one related by half blood when both stand in the same relationship with the deceased. As a rule two or more heirs who succeed together take the property as tenants-in-common as laid down in s 19. Section 20 rules that a child *en ventre sa mere* has the same right to inherit as if he or she had been born before the death of the intestate.

SECTIONS 8 AND 14

Reference may be made to notes under s 14 under ‘Reversioners’ *post*.

SECTIONS 8 AND 15

See notes under s 15(1)(b) and s 15(2)(b) *post*.

RELATIVE BY ADOPTION

The words ‘...upon the heirs, being the relatives specified in Class...of the Schedule’ which appear in cl (a) and (b) of the section and Classes I and II of the Schedule mentioned in those clauses do not expressly refer to relationship by adoption; nor does any relevant definition expressly refer to such relationship. The expression ‘heir’ is defined to mean any person, male or female, who is entitled to succeed to the property of an intestate under the Act (s 3(f)) and the expression ‘related’ is defined to mean ‘related by legitimate kinship’ (s 3(j)). It is a rudimentary rule of Hindu law that the adopted son must be deemed to have been begotten by the adoptive father on his own wife, and that adoption operates as birth of the adoptee in the family of adoption, thus creating legitimate kinship between him and the members of the adoptive family.

The question whether a person who is a relative by adoption, is, or is not, an heir under Class I or Class II of the Schedule must be determined by

reference to the rules of Hindu law relating to adoption, and where the Hindu Adoptions and Maintenance Act 1956 applies, the determination must be in accordance with the provisions of that enactment. Under the Hindu law of adoption, which was operative at the time of the passing of the Hindu Succession Act and continued to be in operation till the coming into force of the Hindu Adoptions and Maintenance Act 1956, adoption had the effect of transferring the adopted boy from his natural family into the adoptive family. It also had the effect of conferring upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son except in a few cases which related inter alia to the share on a partition between an adopted and the afterborn son (see § 494, Vol I). It followed as a necessary corollary to the rule that children born to the adoptee after his adoption acquired rights and privileges in the adoptive family of their father as if the father had been a natural born son in that family. A question may arise as to the rights of a child begotten prior to the adoption of the father and the rights of such child in the property of the father, owned by the father by virtue of his adoption. Such a case arose before the Karnataka High Court in the backdrop of the following facts.

The father was taken into adoption subsequent to a daughter begotten from a subsisting marriage. The wife died and the father remarried. On the death of the adoptee (father) a question arose as to whether the daughter was entitled to lay a claim on the property of the father which vested in the father as a result of the adoption. It was held that the adoption of the father after the birth of the child was no bar to the child's claim over the property. This was because the blood ties between the father and the daughter were not severed on his adoption, and the daughter was entitled to succeed to the property of the father owned by virtue of such adoption, she being a Class I heir of the father. The daughter and the second wife were thus entitled to succeed equally to the estate of the deceased adoptee.⁸⁷ The Hindu Adoptions and Maintenance Act 1956, which came into operation on 21 December 1956, that is some months after the Hindu Succession Act, now regulates adoptions. That Act modifies and alters the prior law of adoption to a considerable extent. It confers wide powers of adoption both on the male and the female Hindu. A male Hindu, under the new Act, has the capacity to adopt a son to himself and has the capacity to take a daughter in adoption (s 7). So also a female Hindu, under the new Act, has now the capacity to adopt a son to herself and she has the right to take a daughter in adoption, (s 8). In all such cases of adoption regulated by the new Act, the effect of adoption is that the adopted child, is from the date of adoption to be deemed to be the child of his or her adoptive father or mother for all purposes (s 12).

⁸⁷ *Neelamma v Shrinani* AIR 1989 Kant 15, but see the decision of the Bombay High Court in *Tarabai v Badgandi* AIR 1981 Bom 13 cited therein.

Having regard, therefore, to the legal consequences and incidents of adoption both under the old Hindu law and the Hindu Adoptions and Maintenance Act, the heirs referred to in cl (a) and (b) of the present section and specified in Classes I and II of the Schedule, mean not only persons related to the intestate by blood but also those related to him by adoption. The definitions of 'agnate' and 'cognate' in s 3(a) and s 3(c) expressly state that the expression include persons by adoption. Presumably this was done to dispel any doubt on the question because the expressions 'agnate' and 'cognate' were not used in Hindu law in any strict legal sense.

ORDER OF SUCCESSION

I. CLAUSE (A): CLASS I OF THE SCHEDULE

Firstly, the heirs of a male Hindu who dies intestate after the commencement of this Act are:

Son
 Daughter
 Widow
 Mother
 Son of a predeceased son
 Daughter of a predeceased son
 Son of a predeceased daughter
 Daughter of a predeceased daughter
 Widow of a predeceased son
 Son of a predeceased son of a predeceased son
 Daughter of a predeceased son of a predeceased son
 Widow of a predeceased son of a predeceased son

These are heirs in Class I of the Schedule. They take *simultaneously*⁸⁸ and to the exclusion of all other heirs (s 9).

Son

(i) *Adopted son*

The expression 'son' used in Class I of the Schedule has not been defined in the Act. It includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of the adoption. A son given in adoption loses all the rights of a son in his natural family including the right of claiming any share in the estate of his natural father or any share in the coparcenary property of his natural family.

⁸⁸ However, in accordance with the four rules in s 10.

Where a son is born after adoption to the adoptive father the adopted son is entitled to inherit just as if he were a natural-born son and is now entitled to the same share as a natural-born son.

Also see 'Relative by adoption' *supra* and ss 5, 7 and 12 of the Hindu Adoptions and Maintenance Act 1956, which Act came into force on 21 December 1956.

For computation of the share of a son, see s 10 and illustrations in the notes under that section, *post*.

Old law.—See §§ 494 and 495 (Vol I).

(ii) Posthumous son

A son of the intestate, who was in the womb at the time of the death of the intestate though subsequently born, is to be deemed for the purpose of succession as if born before the death of the intestate (s 20).

Old law.—The position of a posthumous son under the old law was the same.

(iii) Son born after partition

When there has been a partition of joint family property between a father and his sons and thereafter a son is born to the father, the son will take an interest by birth in the property obtained on partition by the father and the property will be their coparcenary property. In case of death of the father after the commencement of this Act, devolution of the father's interest in such coparcenary property will be governed by s 6 of the Act and succession to the father's separate and self-acquired property will be in accordance with the rules laid down in s 8.

Reference may be made to Notes under s 6.

Old law.—The old law on the question of after-born sons was considerably different. (See §§ 309–10, 340–41).

(iv) Divided son

In matters of succession, the Act does not differentiate between a divided son and a son who had remained joint with his father or his father and other coparceners, except in cases falling under s 6 which relates *inter alia* to the undivided interest of a father in a Mitakshara coparcenary. The separate or self-acquired property of the father will, therefore, devolve by succession upon his heirs specified in Class I of the Schedule including a son who had separated from the father as well as one who had continued to remain joint with the father. (See Illustration (p).) Under the old law, the divided son was not entitled to claim any share in separate or self-acquired property of the father where the father after partition had continued to remain joint with his other sons or where he had a son born to him after partition and who was joint with him.

Old law.—See Vol I, § 43—'divided and undivided sons' and § 341.

(v) Illegitimate son

The illegitimate son of a male Hindu dying intestate is not entitled to any share of the inheritance; not even in case of a Shudra dying intestate after the commencement of the Act. It will be noticed that the law in respect of the right of an illegitimate son of a Shudra to succeed to his father is now wholly changed.⁸⁹ The illegitimate son of a male Hindu of any caste is, however, entitled to claim maintenance from the father and in case of death of the father, from his heirs out of his estate inherited by them so long as the illegitimate son remains a minor and does not cease to be a Hindu (see ss 20(2), 21(viii), 22 and 24 of the Hindu Adoptions and Maintenance Act 1956, which came into force on 21 December 1956).

Reference may also be made to note (vi) below.

Old law.—See Vol I, § 43—‘illegitimate sons’.

(vi) Son born of a void or voidable marriage

Section 16 of the Hindu Marriage Act 1955, relates to legitimacy of children of void and voidable marriages.

One effect of the abovementioned section is that sons and daughters of parents, covered by it, are to be deemed to be the legitimate children of their parents and entitled to succeed to the property of such parents as if they were born in lawful wedlock. Reference may be made to notes under s 16, *supra*.

Illustration

A and *B* are the father and mother of *S*. After *S* was born *B* obtains from the court a decree of nullity of marriage on one of the grounds mentioned in cl (i), (iv) or (v) of s 5 of the Hindu Marriage Act 1955. Notwithstanding the decree of nullity of the marriage of his parents, *S* is entitled to succeed as an heir to the property of his father *A* and his mother *B* as if he was a child born in lawful wedlock. The same will be the status and right in the above case of a daughter to succeed as an heir to the property of *A* and *B* as if she were a child born in lawful wedlock.

(vii) Step-son

A step-son, that is a son of a previous marriage of the wife of the intestate, is not entitled to succeed to the property of the step-father. In this case, there is no relationship with the step-father by full blood, half-blood or uterine blood.

⁸⁹ *Daddo v Raghunath* AIR 1979 Bom 176 (the question has been examined); *Ramkali v Mahila Shyamkali* AIR 2000 MP 288 (rejection of claim for succession certificate—proper).

Where a widow or an unmarried woman adopts a child, any man whom she marries subsequently is deemed to be the step-father of the adopted child.⁹⁰ Such child is entitled to succeed to the property of the mother but not to that of the step-father.

(viii) Son having physical or mental defects

Under the old Hindu Law certain defects, deformities and diseases excluded an heir, as for instance a son, from inheritance. The Hindu Inheritance (Removal of Disabilities) Act 1928, declared that no person shall be excluded from inheritance on any of those grounds unless he was from birth a lunatic or an idiot. That restricted disqualification also is now removed by s 28 of this Act, with the result that no person is now disqualified from succeeding to any property on any ground whatever save as provided in this Act.

Old law.— § 98 (Vol I).

Son of a predeceased son

He inherits simultaneously with a son and the other heirs specified in Class I of Schedule. The rules relating to the right of a son to succeed apply *mutatis mutandis* to the son of a predeceased son.

Character and nature of interest of son in respect of his father's property inherited under this section

It has already been pointed out under Chapter XII (see Vol I) and ss 4 and 6 of this Act that the Act has brought about some radical changes in the law of succession without abolishing the joint family and joint family property except the extent to which it has modified the same—and the former law relating to joint family continues to operate. Question has at times arisen as to whether a son who inherits the self-acquired or coparcenary property of his father (ancestral property) under the present section takes it as his separate property or holds it as property of his own joint family. There was divergence of judicial opinion on this vexed question which related to the doctrine of ancestral property in the hands of a father and his son acquiring interest in it by birth till the decision of the Supreme Court in *Commissioner of Wealth-tax v Chander Sen*.⁹¹

In the Supreme Court, In the case above before there was a joint family constituted by *RL* and his son *CS*, that owned considerable property including a business. There was partial partition between the coparceners and the business was divided between them in 1961. The father, *RL* who thereafter carried on his separate business died in 1965 leaving his son *CS* and sons of *CS* surviving him. Question arose whether the separate property left by

⁹⁰ Hindu Adoptions and Maintenance Act 1956, s 14(4).

⁹¹ AIR 1986 SC 1753

RL and inherited by *CS* under the present section (s 8) was to be regarded as separate property of *CS* or property of the joint family of *CS* in which *CS* and his sons were members (coparceners). It was pointed out by the High Court that the facts of the case were identical with the case of *Commissioner of Income-tax v Ram Rakhpal*.⁹² After referring to the doctrine of coparcenary law relating to ancestral property in the hands of a father and his sons taking an interest in the same simply by birth and examination of a number of decisions of various High Courts, the Supreme Court held that *CS*, the son, had inherited the property as an individual (as his separate property) and that the property did not belong to the joint family of *CS* and could not be included in computing the wealth tax of the joint family. The Supreme Court concluded that the High Court was right and also observed that the view expressed by the High Courts of Allahabad, Madras,⁹³ Madhya Pradesh⁹⁴ and Andhra Pradesh⁹⁵ appeared to be correct and overruled a decision of the Gujarat High Court⁹⁶ on this aspect of ancestral property and scope of the present section (s 8). It was also observed by the Supreme Court that 'It would be difficult to hold today that the property which devolved on a son under s 8 of the Hindu Succession Act would be Hindu Undivided Family property in his hand vis-a-vis his own sons'.⁹⁷ In a later decision too the Supreme Court reaffirmed this view.⁹⁸

In *Commissioner of Income-tax v Ram Rakhpal*,⁹⁹ *RR* and his father *DP* were coparceners in a joint family. There was partition between them in 1948. *DP* died in 1958 and *RR* inherited the property obtained by *DP* on the partition. It was held that the income of the property inherited by *RR* by virtue of this section was his individual income, and not the income of the joint family of *RR*. The contention of the department that the property inherited by *RR* was ancestral property in his hands and belonged to the joint family of *RR* and that *RK* the son of *RR* had acquired interest in it by reason of his birth was rejected by the High Court. It was held that the well-settled rule relating to ancestral property in the hands of a father and his son acquiring interest in it by birth had been altered by the provisions of the Hindu Succession Act and particularly by the present s 8. Property inherited by *RR* from his father was treated as separate property of *RR* and not as the property of the joint family with the *RR* and his son *RK* were members (coparceners). It was inter alia observed:

92 (1968) 67 ITR 164 (All).

93 *Addl Commr of Income-tax v PL Karuppan Chettiar* AIR 1979 Mad 1 (FB).

94 (1983) 138 ITR 673 (MP).

95 (1983) 144 ITR 18 (AP).

96 (1977) 108 ITR 417 (Guj); *Brij Lal v Daulat Ram* 79 PLR 27.

97 *Commr of Wealth-tax, Kanpur v Chander Sen* AIR 1986 SC 1753 at 1760.

98 *Yudhishter v Ashok Kumar* AIR 1987 SC 558.

99 *Commr of Income Tax v Ram Rakhpal* (1968) 67 ITR 164.

Thus, the position under the Hindu law is that partition takes away *qua* a coparcener, the character of coparcenary property from the share of another coparcener continues to be coparcenary property for him and his unseparated issue. This means that, so far as Ram Rakhpal and his issue were concerned, it was only that property which came to the share of Ram Rakhpal which could be regarded as coparcenary property.

In *Additional Commissioner of Income-tax v PL Karuppan Chettiar*,¹ a full bench of the Madras High Court held that property inherited by a son from his divided father—even assuming that it was ancestral property in the hands of the father—would be his separate and individual property and not of the joint family consisting of his wife, sons and daughters.

In *Shrivallabh v Modani*,² the Madhya Pradesh High Court held on the basis of s 8 that 'it would be taken as a self-contained provision laying down the scheme of devolution of the property of a Hindu' and pointed out that in construing the section the law in force earlier should be ignored and the court should confine itself to the language used in the new codifying Act.

In *Commissioner of Income-tax v Mukundgirji*,³ the Andhra Pradesh High Court held that the properties which devolved upon a son in 1958 by inheritance, after the Act came into force, were properties of the son in his individual capacity and not of the joint family of the son. His sons have no right by birth in such properties and cannot, therefore, claim any share or sue for partition of such properties.

Son of a predeceased son of a predeceased son

He inherits simultaneously with a son and other heirs specified in Class I of the Schedule. The rules relating to the right of a son to succeed apply *mutatis mutandis* to the predeceased son of a predeceased son.

Widow

The widow of a male Hindu inherits simultaneously with a son, daughter and the other heirs specified in Class I of the Schedule (s 9). She takes her share absolutely and not as widow's estate (s 14). If there are more than one widow, all the widows together, take one share (s 10, r 1).

Old law.—See Vol I, §§ 43 and 88.

Unchastity of a widow is not, now under the Act, a ground for disqualifying her from succeeding to the estate of her husband (s 28).

Old law.—See Vol I, §§ 96 and 43—'Unchastity'.

Remarriage of a widow is not, now under the Act, a ground for divesting her of the estate inherited by her from her husband. The Hindu Widow's

1 AIR (1979) Mad 1 (FB).

2 (1982) 138 ITR 637.

3 144 ITR 18 (AP).

Remarriage Act 1856, though it legalised the remarriage of a Hindu widow, had the effect of divesting the estate inherited by her as a widow. By her second marriage she forfeited the interest taken by her in her husband's estate, and it passed to the next heirs of her husband as if she were dead (s 2 of that Act). The rule laid down in that enactment cannot apply to a case covered by the present Act and a widow becomes full owner of the share or interest in her husband's property that may devolve on her by succession under the present section. Her remarriage, which would evidently be after the vesting in her of her share or interest on the death of the husband, would not operate to divest such share or interest. The Hindu Widow's Remarriage Act 1856, is not repealed, but s 4 of the present Act in effect abrogates the operation of that Act in the case of a widow who succeeds to the property of her husband under the present section, and s 14 has the effect of vesting in her that interest or share in her husband's property as full owner of the same.⁴ So also, if the husband dies pending divorce proceedings, the wife would not lose her rights to succeed to the husband's property.⁵ Reference may be made to notes under s 14.

Old law.—See Vol I, § 43—'Remarriage' which deals with both Mitakshara and Dayabhaga.

Conversion of a Hindu widow to another religion is not a ground for divesting her of property inherited by her from her husband. Section 26 of the Act, which in terms deals with certain disqualifications ensuing upon change of religion, does not affect the right of a widow who has succeeded to her husband. The effect of conversion of a wife to another religion during the lifetime of the husband is not *per se* to dissolve the marriage, but is under s 13(1)(ii) of the Hindu Marriage Act 1955, only a ground for seeking from the court dissolution of the marriage. The mere fact, therefore, that the widow had ceased to be a Hindu by change of religion before the death of her husband does not exclude her from inheriting her husband's property.

Old law.—Change of religion and loss of caste which at one time were grounds of forfeiture of property and exclusion from inheritance had ceased to be so since the passing of the Caste Disabilities Removal Act 1850.

Widow of a Predeceased son

She inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. The rules relating to the right of a widow to succeed apply *mutatis mutandis* to the widow of a predeceased son. She is, however, not entitled to succeed if, on the date the succession opens, she has remarried (s 24).

Old law.—See Vol I, §§ 35 and 43.

⁴ *Bhuri Bai v Champa Bai* AIR 1968 Raj 139, 144; *Haravati v Jasodhara* AIR 1977 Ori 143.

⁵ *Thankam v Rajan* AIR 1999 Ker 62.

Widow of a Predeceased son of a Predeceased son

She inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. The rules relating to the right of a widow to succeed apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son. She is, however, not entitled to succeed if, on the date the succession opens, she has remarried (s 24).

Old law.—See Vol I, §§ 35 and 43.

Daughter

(i) Daughter

The daughter, whether married or unmarried, inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. Each daughter takes one share⁶ that is equal to that of son. She takes her share absolutely and not as woman's estate.⁷ There is no priority among married and unmarried daughters.⁸ Unchastity of a daughter is no ground for exclusion.⁹ Since a daughter is an enumerated heir, if a father has made a gift to the daughter at the time of her marriage, it would not disentitle her claiming a share as her father's heir.¹⁰

The wife and daughters of a male Hindu would get an equal share in the property of a male Hindu dying intestate. Thereafter, the bequest of her share by the mother to one of the daughters, would be of only her (1/8th) share in the estate of the father.¹¹

Old law.— See Vol I, § 43.

If the deceased himself had been an adopted son and had, daughter before his adoption the daughter would be an heir under cl (a) as one of the heirs specified in Class I of the Schedule.¹² See Illustration 1A under s 10 *infra*.

(ii) Intestate having interest in coparcenary

See s 6 and notes thereunder.

(iii) Adopted daughter

'Daughter' would include an adopted daughter. A male Hindu has now the capacity, under s 7 of the Hindu Adoptions and Maintenance Act 1956, to take a daughter in adoption. An adopted daughter is, therefore, one of the heirs under Class I of the Schedule. Also, see 'Relative by adoption'.

⁶ Section 10, r 2.

⁷ Section 14.

⁸ *Narain Bai v State of Haryana* AIR 2001 PSH 206, *Subbayajoga v Narayan* AIR 2004 Kant 430 (married daughter entitled).

⁹ See s 28 and notes thereunder.

¹⁰ *Meenakshamma v Nanjundappa* AIR 1993 Kant 12.

¹¹ *Ramabai Patil v Rukminibai Vekhande* AIR 2003 SC 3109.

¹² *Kausalyabai v Devkai* (1978) Mah LJ 357.

Old law.—See Vol I, § 43 and § 88.

Adopted son and adopted daughter

Under the provisions of the Hindu Adoptions and Maintenance Act 1956, it is competent for a male Hindu to have both an adopted son and daughter. Therefore under Class I of the Schedule an adopted son and an adopted daughter can both be his heirs and take simultaneously.

(iv) Posthumous daughter

See 'Posthumous son'. Also, see s 20 *post*.

(v) Illegitimate daughter

The illegitimate daughter of a male Hindu dying intestate is not entitled to any share of the inheritance; not even in case of a shudra. It will be noticed that the position of an illegitimate son of a shudra was different under the old law. An illegitimate daughter of a Hindu is entitled to inherit to her mother (See notes under s 15 *post*). The illegitimate daughter of a male Hindu is, however, entitled to claim maintenance from the father, and in case of death of the father, from his heirs out of his estate inherited by them so long as she remains a minor and does not cease to be a Hindu (See ss 20–22 of the Hindu Adoptions and Maintenance Act 1956, which came into force on 21 December 1956).

Reference may also be made to note (vi) below and s 16 of the Hindu Marriage Act 1955, and notes thereunder.

Old law.—See Vol I, § 43—'Illegitimate daughter'.

(vi) Daughter born of a void or voidable marriage

See 'son born of a void or voidable marriage'.

(vii) Daughter having physical or mental defects

See notes under 'Son having physical or mental defects'. Also see s 28 *post*.

Mother

The mother inherits simultaneously with a son, widow, daughter and other heirs specified in Class I of the Schedule. She takes her share absolutely (s 14). Unchastity of a mother is no bar to her succeeding as heir to her son;¹³ nor does divorce or remarriage constitute any such bar. The Hindu Widow's Remarriage Act 1856, is not repealed, but s 4 of the present Act in effect abrogates the operation of that Act in respect of matters dealt with by it. Even if that Act could apply to the case of a mother before this Act came into operation there can be no doubt that the present section and ss 4 and 14 of this Act have the effect of laying down, that her remarriage is

¹³ *Jayalakshmi v Ganesh Iyer* AIR 1972 Mad 357.

no bar to her succeeding as heir to her son and that there can be no divesting of the interest that she acquires in his property by reason of a remarriage.¹⁴

Mother includes adoptive mother because under the old Hindu Law¹⁵ and now under the Hindu Adoptions and Maintenance Act 1956, an adopted son is deemed to be the child of the adoptive parent or parents for all purposes with effect from the date of the adoption.¹⁶ On the death of a son adopted in *duyamushyayana* form, the adoptive mother and natural mother inherited equally as co-heiresses.¹⁷ However, that form of adoption is not recognised in case of adoptions made after the Hindu Adoptions and Maintenance Act 1956 came into force.¹⁸

Adoption has the effect of severing all the ties of the son with the natural parents and their family and therefore the natural mother is not entitled to succeed to the property of her son given in adoption.¹⁹

A mother is entitled to succeed to the property of her *illegitimate* son as an heir in Class I of the Schedule (see Proviso to s 3(1)(j)).

A mother of a son born of a void or voidable marriage is entitled to succeed as his heir in cases falling within the purview of s 16 of the Hindu Marriage Act 1955. In cases covered by that section, the son is to be deemed to be the legitimate son of the parents and the proviso to that section does not create any bar to the right of the mother to succeed to such son.

A step-mother is not entitled as mother to inherit to her step-son as one of the heirs in Class I, but she can be an heir as father's widow under Entry VI of Class II of the Schedule.

Old law.— See Vol I, § 43.

Son of a Predeceased daughter

The son of a predeceased daughter inherits simultaneously with a son, widow and the other heirs specified in Class I of the Schedule. Daughter's son would include adopted son of a predeceased daughter; that is if the latter was in the position of the adoptive mother.²⁰ A female Hindu, who is not married or if married whose marriage has been dissolved or is a widow or whose husband has renounced the world or ceased to be a Hindu or has

14 Reference may be made to *Mantorabai v Parotanbai* AIR 1972 MP 145, where agreement has been expressed with this view; *Gurdi Singh v Darshan Singh* AIR 1973 P&H 363 (mother had remarried before death of the son); *Ratni Bai v Man Kuwar* (1978) Mad LJ 515.

15 See § 43, Vol I under 'adoptive mother'.

16 See ss 7, 8, 12 and 14 of that Act.

17 See § 486 (4), Vol I.

18 See s 5 of the Hindu Adoptions and Maintenance Act.

19 See § 494, Vol I. Also see s 12 of the Hindu Adoption and Maintenance Act 1956.

20 See § 14 of the Hindu Adoption and Maintenance Act 1956.

been declared by a court to be of unsound mind, has now the capacity, under s 8 of the Hindu Adoptions and Maintenance Act 1956, to take a son or daughter in adoption to herself. Therefore, a son adopted by her would, in case of her death during the life-time of her father who subsequently dies intestate, be in the position of a daughter's son and entitled to succeed as such under the present section.

Also see 'Relative by adoption'. For computation of the share of a daughter's son see s 10 and illustrations in notes under that section, *infra*.

Old law.—See Vol I, § 43.

Daughter of a Predeceased son

The daughter of a predeceased son inherits simultaneously with a son, daughter, widow, son of a predeceased son and the other heirs specified in Class I of the Schedule. Son's daughter would include the adopted daughter of a predeceased son. Reference may be made to notes under 'Daughter'. For computation of her share, see s 10.

Old law.—See Vol I, § 43.

Daughter of a Predeceased daughter

The daughter of a predeceased daughter inherits simultaneously with a son, daughter, widow, son of a predeceased daughter and the other heirs specified in Class I of the Schedule. (Also see 'Relative by adoption'.) Reference may be made to notes under 'Daughter'. For computation of her share, see s 10 *infra*.

Old Law.—See Vol I, § 43.

Daughter of a Predeceased son of a Predeceased son

The daughter of a predeceased son of a predeceased son inherits simultaneously with a son, daughter, widow and the other heirs specified in Class I of the Schedule. Also see 'Relative by adoption'. Reference may be made to the notes under 'Daughter'. For computation of her share, see s 10, *infra*.

II. CLAUSE (B)—CLASS II OF THE SCHEDULE

Failing all heirs of the intestate male specified in Class I of the Schedule, but not until then, his property devolves upon the heirs specified in the nine entries in Class II of the Schedule. The heir in the first entry in this class is preferred to those in the second entry; the heirs in the second entry are preferred to those in the third entry and so on in case of succeeding entries.

There is little scope for suggesting that the heirs mentioned in Class II all take cumulatively. They succeed only in the order of the Entries I to IX.²¹

²¹ *Kumaraswami v Nanjappa* AIR 1978 Mad 285 (FB).

Entry I

Father

He is the only heir specified in Entry I of Class II and failing any heir in Class I, he takes the whole property of the intestate. Under the old law, mother ranked as an heir before the father except in cases governed by *Mayukha* Law.

If the intestate had been an adopted son, *the adoptive father* and his relatives would stand in the same relationship to the deceased as if he were a son born in the adoptive family. The adoptive father, therefore, would be the heir of the intestate under Entry I of Class II.²² Adoption has the effect of transferring the adopted boy from his natural family into the adoptive family. While the adopted son acquires the rights of a son in the adoptive family, he loses all the rights of a son in his natural family including the right of claiming any share in the estate of his natural father or natural relations or any share in the coparcenary property of his natural family. Conversely, the natural father is not entitled to succeed to the property of his natural son given in adoption. Also, see 'Relative by adoption', *supra*.

A mother is entitled to succeed to the property of her illegitimate son, but a father is not entitled to any interest by succession in the property of an illegitimate son. The proviso to s 3(1)(j) does not apply to his case.

A father of a son born of a void or voidable marriage is entitled to succeed as his heir in cases falling within the purview of s 16 of the Hindu Marriage Act 1955. (See s 16, *supra* and notes under that section.) In cases covered by that section, the son is to be deemed to be the legitimate son of the parents and the proviso to that section does not create any bar to the right of the father to succeed to such son.

A step-father is not entitled to succeed to the property of his step-son.

Entry II

Son's daughter's son
Son's daughter's daughter
Brother
Sister

These heirs specified in Entry II of Class of the Schedule share the property simultaneously and equally (s 11) and to the exclusion of those specified in the subsequent entries.

Son's daughter's son

The son of a predeceased daughter of a predeceased son mentioned in this Entry would include the adopted son of the son's daughter. The rules relating to the right of the adopted son and adopted daughter of a predeceased daughter to succeed apply *mutatis mutandis* to such adopted son. Also see 'Relative by adoption' *supra*.

²² See the Hindu Adoptions and Maintenance Act 1956, s 12

For computation of the share of a son's daughter's son, see s 11.

Son's daughter's daughter

The daughter of a predeceased daughter of a predeceased son mentioned in this Entry would include the adopted daughter of a son's daughter. The rules relating to the right of the adopted daughter of a predeceased son to succeed apply *mutatis mutandis* to the adopted daughter of a predeceased daughter of a predeceased son. Also see 'Relative by adoption', *supra*.

For computation of the share of a son's daughter's daughter, see s 11, *infra*.

Brother

Brother specified in this Entry as an heir inherits simultaneously with the sister and other heirs mentioned in the Entry.²³ He may be a brother of the full blood or of the half-blood. However, where there is a full brother and a half-brother of the intestate the full brother is preferred to the half-brother (s 18). The half-brothers referred to here are sons of the same father by a different mother. Uterine brothers, that is sons of the same mother by different fathers are not entitled to succeed to one another as 'brothers' under this Entry although related by legitimate kinship. This necessarily follows from the Explanation to the Schedule.²⁴ However, where the intestate and his brother are the illegitimate sons of their mother they are deemed to be related to one another as 'brothers' under this Entry. Although the expressions 'relatives' and 'related' mean persons related by legitimate kinship, the proviso to the definition of 'related' in s 3(1)(j) states an express rule having the effect *inter alia* of giving recognition to the rights of such illegitimate offspring to succeed to one another.

Where a son is born to a male Hindu after he has taken a son in adoption, the adopted son stands in the same relationship to the natural-born son as if he were himself a natural-born son. Such adopted son and natural-born son are 'brothers' within the meaning of this Entry and entitled as such to succeed to one another. Also see 'Relative by adoption' and ss 5, 7, 11 and 12 of the Hindu Adoptions and Maintenance Act 1956.

For computation of the share of a brother, see s 11.

Old law.—See Vol I, § 43.

Sister

Sister specified in this Entry as an heir, inherits simultaneously with the brother and other heirs mentioned in the Entry.²⁵ She takes her share absolutely

23 As to full-brother and half-sister and full-sister and half-brother of the intestate, see notes under s 18 *post*.

24 A uterine brother can, however, succeed as a cognate under clause (d) of s 8 when there are no heirs of the deceased under cll (a)–(c) of the section.

25 As to full-sister and half-brother and full-brother and half-sister of the intestate, see notes under s 18 *post*.

and not a limited estate (s 14). She may be sister of the full-blood or of the half-blood. However, where there is a full-sister and a half-sister of the intestate, the full-sister is preferred to the half-sister. The intestate and the half-sister referred to here are children of the same father by different mothers. As between a full-brother and a half-sister or a full-sister and a half-brother, the former would be preferred on the ground, that full-blood is preferred to half-blood (s 18). Where the intestate male and the sister are son and daughter of the same mother by different fathers, the uterine sister is not entitled to succeed as a 'sister' under this entry although related to the intestate by legitimate kinship.²⁶ This necessarily follows from the *Explanation* to the Schedule.²⁷ However, where the intestate and his sister are the illegitimate children of their mother they are deemed to be related to one another as 'brother' and 'sister' within the meaning of this entry. Although the expressions 'relatives' and 'related' mean persons related to by legitimate kinship, the proviso to the definition of 'related' in s 3(1)(j) states an express rule having the effect inter alia of giving recognition to the rights of such illegitimate offspring to succeed to one another.

Where a son is born to a male Hindu after he has taken a daughter in adoption in accordance with the law in force at the time of adoption or where a male Hindu having a son adopts a daughter in accordance with the law in force at the time of adoption, the adopted daughter stands in the same relationship to the son as if she were a natural-born daughter. Such an adopted daughter is a 'sister' within the meaning of this entry and entitled to succeed to the son as such. Also see 'Relative by adoption', supra and ss 5, 7, 11 and 12 of the Hindu Adoptions and Maintenance Act 1956.

For computation of share of a sister see s 11 infra.

Old law.—See Vol I, § 43.

Entry III

Daughter's son's son
 Daughter's son's daughter
 Daughter's daughter's son
 Daughter's daughter's daughter

These heirs specified in Entry III of Class II of the Schedule share the property simultaneously and equally (s 11) and to the exclusion of those specified in the subsequent entries.

See 'Son of a predeceased daughter' and 'Daughter of a predeceased daughter' supra.

Also see 'Relative by adoption' supra.

²⁶ *K Raj v Muthamma* (2001) 6 SCC 279.

²⁷ A uterine sister can, however, succeed as a cognate under cl (d) of s 8 when there are no heirs of the deceased under cll (a)–(c) of the section.

Entry IV

Brother's son
Sister's son
Brother's daughter
Sister's daughter

} These heirs specified in Entry IV of Class II of the Schedule share the property simultaneously and equally (s 11) and to the exclusion of those specified in the subsequent entries.

The heirs specified in this entry are the son and daughter of a predeceased brother and of a predeceased sister. It has already been pointed out that the full-brother is preferred to the half-brother and the full-sister is preferred to the half-sister (entry II). Similarly under the present entry, where there is a son of a full brother and also a son of a half-brother the former is preferred to the latter. Since a brother's son's son is not included in the entry, he cannot be preferred.²⁸ The position is similar in case of the other heirs specified in this entry. Also, see s 18 and notes thereunder.

When a male Hindu dies intestate and there are no heirs in Class I, heirs in Class II are preferred. In case any heir in any class is the sole heir, such heir would be a legal representative.²⁹ A sister's son is a preferential heir as compared to a grandson of an uncle of the deceased.³⁰

The intestate and the half-brother, or the intestate and the half-sister referred to above must be children of the same father by a different mother. Where the intestate male and the brother or sister were children of the same mother by different fathers, the relationship will be by uterine blood and the son or daughter of such uterine brother or uterine sister are not entitled to succeed under this entry although related to the intestate by legitimate kinship. This necessarily follows from the explanation to the Schedule.³¹ But where the intestate and his brother or sister were illegitimate children of their mother they will be deemed to be related to one another as brothers or as brother and sister within the ambit of this section. Although the expressions 'relatives' and 'related' means persons related by legitimate kinship the proviso to the definition of 'related' in s 3(1)(j) states an express rule having the effect inter alia of giving recognition to the rights of the legitimate descendants of such illegitimate offspring and the words 'brother' and 'sister' in this Entry must be construed accordingly.

28 *Sunderlal Chourasiya v Tejila* AIR 2004 MP 138. (legatee dying before testator, such legacy would form residuary property of testator). (s 10 of the Succession Act).

29 *Sarada v Chakkunny* AIR 1992 Ker 249 (sister's daughter's sole heirs and legal representative on failure of heirs in Class I).

30 *Pushpatti Nath v Ravi Prakash Gaur* AIR 2003 P&H 372.

31 A uterine brother's son or daughter and a uterine sister's son or daughter can, however, succeed as cognates under cl (d) of s 8, when there are no heirs of the deceased under cll (a)–(c) of the section.

Entry V

Father's father	}	These heirs specified in Entry V of Class II of the Schedule share the property simultaneously and equally (s 11) and to the exclusion of those specified in the subsequent entries.
Father's mother		

See notes under 'Father' and 'Mother' *supra*.

Father's step-mother is not entitled as father's mother to inherit to her step-son's son as one of the heirs in this entry. Nor is she entitled to inherit under cl (c) or (d) of the section there being no relationship by blood.

Old law.—See Vol I, § 43.

Entry VI

Father's widow	}	These heirs specified in Entry VI of Class II of the Schedule share the property simultaneously and equally (s 11) and to the exclusion of those specified in the subsequent entries.
Brother's widow		

Father's widow, that is a step-mother, is now recognised as one of the heirs of the male intestate, but not as a very near relation. The step-mother of the intestate is entitled to succeed under this entry.

Reference may be made to notes under 'Father'.

Remarriage of the father's widow does not constitute any bar to her right to succeed under this Entry. She is not one of the persons disqualified under s 24 of the Act. Unchastity of the father's widow (step-mother) does not disqualify her from succeeding under the Entry.³²

Brother's widow is not entitled to succeed as an heir under this Entry if on the date the succession opens she had remarried (s 24).

Reference may be made to notes under 'Brother' *supra*.

Reference may be made to notes under s 18 for relationship by full-blood and half-blood.

Also see 'Relative by adoption' *supra*.

Entry VII

Father's brother	}	These heirs specified in Entry VII of Class II of the Schedule share the property simultaneously and equally and to the exclusion of those specified in the subsequent entries.
Father's sister		

³² *Jayalakshni v Ganesa Iyer* AIR 1972 Mad 357.

The father's brother may be a brother of the full-blood or of the half-blood. However, a father's brother of the full-blood will be preferred to a father's brother of the half-blood (s 18). The father's uterine brother is not entitled to succeed as father's brother.³³

The father's sister may be a sister of the full-blood or of the half-blood. However, a father's sister of the full-blood will be preferred to a father's sister of the half-blood (s 18). The father's uterine sister is not entitled to succeed as father's sister.³⁴ (Also see 'Relative by adoption', supra.) Reference may also be made to notes under s 18 for relationship by full-blood and half-blood.

For computation of shares of the father's brother and father's sister see s 11, *infra*.

Old law.—See Vol I, § 43.

Entry VIII

Mother's father	These heirs specified in Entry VII of Class II of the Schedule share the property simultaneously and equally and to the exclusion of those specified in the subsequent entry.
Mother's mother	

See notes under 'Father' and 'Father's mother'. Also see 'Relative by adoption'.

Entry IX

Mother's brother	These heirs specified in Entry IX of Class I of the Schedule share the property simultaneously and equally and to the exclusion only of the agnates and cognates of the intestate.
Mother's sister	

See notes under 'Father's brother' and 'Father's sister' above.

Also see notes under 'Brother' supra and 'Sister'. Reference may also be made to notes under s 18 for relationship.

III. CLAUSE (C)—AGNATES

Failing all heirs of the intestate male specified in Classes I and II of the Schedule, but not until then, his property devolves upon his agnates.

A person is said to be an 'agnate' of another if the two are related by blood or adoption wholly through males (s 3(1)(a)). The expression 'related' has been defined in s 3(1)(j) to mean related by legitimate kinship. It follows from cl (c) of s 8 read with the relevant definitions that:

³³ See *Explanation* to the Schedule. He can succeed as a cognate.

³⁴ *Ibid.* She can succeed as a cognate.

- (1) Both, male and female relatives by blood or adoption having legitimate kinship with the intestate are included among his agnates, provided the relationship is wholly through males. Thus, a father's brother's daughter is an agnate. But a father's sister's son is not an agnate because he is not related to the intestate wholly through males. Not being related to the intestate wholly through males, he is only a cognate of the intestate.

Agnates do not include the widows of the lineal descendants of the intestate, or widows of those who may be related to him as lineal male descendants of his lineal ascendants, because the definition of agnates does not extend to relatives by marriage but is confined to relatives by blood or adoption. Some of the female heirs specified in Class I and II of the Schedule are widows of agnatic relations of the intestate, but they succeed as heirs expressly recognised by cl (a) and (b) of s 8. Widow of a predeceased son and widow of a predeceased son of a predeceased son are not relatives by blood but by marriage. However, they succeed, as heirs expressly recognised in Class I. Father's widow (step-mother) and brother's widow are also not relatives by blood, but by marriage. However, they succeed as heirs expressly recognised in Class II. Mother and father's mother are relatives not by blood but by marriage. They are not agnates but relatives specified as heirs respectively in Class I and Class II of the Schedule and succeed as such. Father's father's mother is not a relative by marriage but by blood. She is not specified as an heir in the Schedule, and is entitled to succeed only as an agnate.

- (2) There are no degrees of relationship beyond which kinship is not recognised so that an agnate howsoever remotely related to the intestate is entitled to succeed as an heir.
- (3) Excluding heirs already specified in the two classes of the Schedule, all lineal male descendants of the intestate, howsoever remote, are his agnates. So also all his female descendants however remote are his agnates if they are related to him wholly through males. Similarly, all his lineal male ascendants, as also the lineal descendants male or female of his lineal ascendants however remote are among his agnates provided the female descendants are related to him wholly through males. Thus a father's father's father's son's son's daughter is an agnate, but a father's sister's son is not an agnate as he is not related to the intestate wholly through males.

Clause (c) applies to agnates other than those heirs who are already specified in Classes I and II of the Schedule and are related to the intestate wholly through males. The definition of agnates in s 3(1)(a) applies 'unless the context otherwise requires' and the context requires that the heirs specified in cl (a) and (b) of the

present section are not to be included in the category of agnates recognised as heirs under sub-s (c).

- (4) Relationship by blood includes relationship by full-blood, half-blood and uterine blood. Relationship by uterine blood cannot, however, create agnatic kinship because relatives by uterine blood cannot be related to the intestate male wholly through males. However, agnates include persons related to one another by full-blood as well as half-blood. Heirs of full-blood are, however, preferred to heirs of the half-blood (s 18). Reference may be made to notes under s 18 for competing heirs related by full-blood and half-blood.

Agnates also include relatives by adoption. See 'Relative by adoption', *supra*.

Order of succession among agnates

Clause (c) of s 8 does not give a list of agnates or state the order in which they are entitled to succeed under it. But s 12 lays down certain rules of preference which are determinative of order of succession among agnates and s 13 lays down certain rules for the purpose of determining that order by computation of degrees, both of ascent and descent. Another rule of preference contained in s 18 is the general provision that heirs related to an intestate by full-blood shall be preferred to heirs related by half-blood, if the nature of the relationship is the same in every other respect.

IV. CLAUSE (D)—COGNATES

Failing all heirs of the intestate specified in Classes I and II of the Schedule and also all agnates, but not until then, his property devolves upon his cognates.³⁵

A person is said to be a cognate of another, if the two related by blood or adoption but not wholly through males (s 3(1)(c)). They may be related through one or more females. Thus, a mother's brother's son and a brother's daughter's daughter's are cognates. The expression 'related' has been defined in s 3(1)(j) to mean related by legitimate kinship. It follows from cl (d) of s 8 read with the relevant definitions that:

- (1) Excluding heirs specified in the two classes of the Schedule, all male and female relatives by blood or adoption, having legitimate kinship with the intestate are his cognates where the relationship is through one or more females.

Cognates do not include the widows of any person related to the intestate by blood or adoption. The definition of cognates does not extend to relatives by marriage, but is confined to relatives by blood or adoption.

³⁵ *Krishna Chandra v Niramani* AIR 1987 SC 105.

Clause (d) applies to those heirs who are related to the intestate through one or more females. The definition of cognates in s 3(1)(c) applies 'unless the context otherwise requires' and context requires that the heirs specified in cl (a) and (b) of the present section are not to be included in the category of cognates recognised as heirs under cl (d).

- (2) There is no degree of relationship beyond which kinship is not recognised so that a cognate howsoever remote to the intestate is entitled to succeed as an heir.
- (3) Relationship by blood includes relationship by full-blood, half-blood and uterine blood. Heirs of full-blood are, however, preferred to heirs related by half-blood. Reference may be made to notes under s 18 for competing heirs related to the intestate by full-blood and half-blood. Two persons are said to be related to each other by uterine blood when they are descended from a common ancestress, but by different husbands (s 3(1)(e)(ii)). Relatives by uterine blood have legitimate kinship and can therefore claim relationship by blood with the intestate. The relationship would necessarily be through one or more females and those who satisfy the above requirements would be included among the cognates of the intestate. Thus the uterine brother or uterine sister of the intestate is entitled to succeed as a cognate under cl (d); and similarly others related to the intestate by uterine blood are included in the category of cognates. It is only in case of heirs expressly specified in Classes I and II of the Schedule that reference to a brother or sister does not include a brother or sister by uterine blood. That rule laid down in the Explanation to the Schedule has no application to the category of cognates recognised as heirs under cl (d).

Cognates also include relatives by adoption.

Order of succession among cognates

Clause (d) of s 8 does not give a list of cognates or state the order in which they are entitled to succeed under it. However, s 12 lays down certain rules of preference which are determinative of the order of succession among cognates and s 13 lays down certain rules for the purpose of determining that order by computation of degrees, both of ascent and descent. Another rule of preference contained in s 18 is the general provision that heirs related to an intestate by full blood shall be preferred to heirs related by half-blood if the nature of the relationship is the same in every other respect. See illustrations under s 18 *infra*.

Death of a male Hindu who was member of a Mitakshara coparcenary

Section 6 of the Act contains a vital provision and deals with the question

of devolution of interest in coparcenary property in case of a male Hindu governed by Mitakshara law where he has left surviving him a female relative specified in Class I of the Schedule to this Act. Reference may be made to the notes under that section.

9. Order of succession among heirs in the Schedule.—Among the heirs specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in Class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

The section states some important rules which are supplementary to the primary and pivotal rules laid down in s 8 and the explicit declaration of the law in this section governs the order of succession among the heirs enumerated in Classes I and II of the Schedule.

The heirs specified in Class I of the Schedule may, for convenience, be described as the preferential heirs of the intestate. They succeed simultaneously and there is, therefore, no question of any precedence or priority among them. As heirs specified in Class I of the Schedule they constitute a distinct and exclusive category and succeed in preference to all other heirs.

Failing all heirs of the intestate in the category of the preferential heirs enumerated in Class I of the Schedule, but not until then his property devolves upon the heirs specified in the second category of heirs enumerated in the nine entries in Class II of the Schedule. It is important to note that the nine Entries constitute distinct and separate groups of heirs one in a prior Entry being preferred to one in the next Entry and so on in order of the Entries. However, there is no precedence or priority among the different heirs mentioned in any particular Entry. They stand *in aequali jura* with this qualification that full-blood is to be preferred to half-blood.

Having regard to the section and s 11 there is little scope for the contention that the different heirs mentioned in what may be described as sub-divisions of any particular Entry in Class II of the Schedule do not inherit simultaneously. Such a contention was raised in the undermentioned case³⁶ and was negatived. See Illust 7 below and also see notes under s 11 *post*.

³⁶ *Arunachalathammal v Ramachandran* AIR 1963 Mad 255; *Satya Charan v Urmila* AIR 1970 SC 1714.

Illustrations

- 1 *A* dies, leaving surviving him among others his widow, two sons, son of a predeceased son, widow of another predeceased son, two daughters and a son of predeceased daughter. All these are among the preferential heirs specified in Class I. They take *A*'s property simultaneously and to the exclusion of all other heirs such as father, brother and son's daughter's son who are heirs specified in Class II. As for their shares, see notes under s 10.
- 2 *A* dies leaving surviving him *SSW*, the widow of a predeceased son of a predeceased son, son's daughter's son and his brother. *SSW* being the only heir specified in Class I will take the whole of *A*'s property to the exclusion of all the other heirs. However, if *SSW* had remarried during the lifetime of *A*, she will not be entitled to succeed to *A*'s property (s 24) which will devolve equally upon *A*'s son's daughter's son and brother who are both heirs specified in Entry II of Class II.
- 3 *A* dies leaving surviving him his father and son's daughter's son. The father being an heir specified in Entry I of Class II will take *A*'s property in preference to and to the exclusion of the son's daughter's son who is an heir specified in Entry II of Class II.
- 4 *A* dies leaving surviving him two brothers, a son's daughter's son and a daughter's son's son. The brothers and the son's daughter's son being heirs specified in Entry II of Class II, will take *A*'s property to the exclusion of the daughter's son's son who is an heir specified in Entry III of Class II.
- 5 *A* dies leaving surviving him a brother, a step-brother and the son of a predeceased brother. Full-blood is preferred to half-blood (s 18) and therefore the brother who is an heir specified in Entry II of Class II will have preference over the step-brother and will take the whole of *A*'s property to the exclusion of the step-brother and of the brother's son who is an heir in Entry IV of Class II. If *A* dies leaving only his step-brother and the son of a predeceased full-brother, the step-brother will take the property to the exclusion of the brother's son.³⁷
- 6 *A* dies leaving surviving him a step-sister, a uterine brother, and a uterine sister. The step-sister will take the whole of *A*'s property as she is within the meaning of sister specified as an heir in Entry II of Class II of the Schedule. Reference to 'brother' or 'sister' in the Schedule does not include reference to uterine brother or uterine sister.³⁸

³⁷ See 'Brother' *supra*.

³⁸ See *Explanation* to the Schedule

- 7 *A* dies leaving surviving him a brother's son and sons and daughters of his sister. They are all heirs in Entry IV of Class II and will take *A*'s property simultaneously and in equal shares. See notes under s 11 *post*.
- 8 *A* dies leaving surviving him his sister *C* and his brother's son *BS*. The sister *C* being an heir in Entry II of Class II is a preferential heir to *BS* who is an heir in Entry IV of Class II.³⁹

10. Distribution of property among heirs in Class I of the Schedule.—

The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules:

Rule 1.—The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2.—The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3.—The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4.—The distribution of the share referred to in Rule 3—

- (i) among the heirs in the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion;
- (ii) among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

DISTRIBUTION AMONG HEIRS IN CLASS I OF THE SCHEDULE

Sections 8 and 9, so far as they relate to heirs specified in Class I of the Schedule, contain the explicit declaration of the law that the preferential heirs enumerated there take simultaneously, and to the exclusion of all other heirs. There is no precedence or priority among them, but it does not follow that every individual who succeeds as an heir listed in Class I of the Schedule is entitled to an equal share of the property along with every other individual heir in that class. The computation of the shares or portions of the heirs so listed is to be in accordance with the rules laid down in this

³⁹ *Apariti Bewa v Suna Stree* AIR 1963 Ori 166; also see this case under s 15 *post*.

section which may be said to constitute the statute of distribution applicable to heirs in Class I. It can be seen from the preceding sections and the Schedule, that the legislature does not lay down any rule of discrimination between a male heir and a female heir. The general scheme of the Act is to put sons and daughters as far as possible on the same footing and allot shares to them *pari passu*. Section 19 states the broad general rule that if two or more heirs succeed together to the property of an intestate, they shall take the property:

- (a) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and
- (b) as tenants-in-common and not as joint tenants. This is subject to any express provision to the contrary.

Rule 2 of the present section gives effect to the general rule wherein each claimant has a share in his or her own right as in equal degree of kinship to the deceased and not as representing another person, that is, distribution *per stirpes*. The general rule is based on the broad principle of equalization.

Reference may be made to notes under s 19 *post*.

Rule 3 expressly provides for the exception that heirs of the deceased in the branches of predeceased sons and predeceased daughters take not *per capita*, but *per stirpes*.

Rule 4 is of the nature of a corollary to Rule 3. Distribution *per capita* wherein each claimant has a share in his own right as in equal degree of kindred to the intestate is not recognised in case of heirs (widow, sons or daughters) in the branches of predeceased sons and predeceased daughters enumerated in Class I. In their case, distribution is *per stirpes* wherein division is according to stocks, that is, taking into consideration the share which the predeceased sons or daughters would themselves have taken if they had survived the *propositus*. It will be noticed that Rule 4 describes the distributive shares of such widow (or widows), sons and daughters in the branch of a predeceased son or a predeceased daughter as portion or portions which they get when distribution in their case is *per stirpes*.

Rule 1 lays down that the widow of the intestate is entitled to take one share, that is the same share that a son, daughter or mother takes under r 2. However, if there are more widows than one, each widow does not take share, but the widows together take one share.

The section deals with distribution of property among heirs of the intestate enumerated in Class I. The expressions 'heirs in the branch of the predeceased son' and 'heirs in the branch of the predeceased daughter' in the rules mean heirs of the intestate enumerated in Class I constituting the branch of the predeceased son or predeceased daughter and not heirs of such predeceased son or predeceased daughter. The heirs of the intestate in the branch of a predeceased son are son of a predeceased son; son of a predeceased son

of a predeceased son; daughter of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son; and widow of a predeceased son of a predeceased son. The heirs of the intestate in the branch of a predeceased daughter are son of a predeceased daughter and daughter of a predeceased daughter.

Illustrations

- 1 *A* dies leaving surviving him his widows *W* and *W1*, his mother *M* and two sons *S* and *S1* and two daughters *D* and *D1*. *S*, *S1*, *D*, *D1* and *M* will each take one share, that is one-sixth share; and *W* and *W1* will together take one-sixth share. Therefore, each widow will take one-twelfth of the property left by *A*.
- 2 *A* was adopted as a son in 1924. At that time *A* had a daughter *K* born of his predeceased wife *DR*. *A* died in 1965 leaving surviving him his two widows *J* and *DE* and his daughter *K*. Soon thereafter, *J* died and *DE* claimed the entire property to the exclusion of *K*. It was held that *K* had become entitled on *A*'s death to half the property left by *A* and the two widows had each become entitled to one-fourth each under s 8 read with s 10, r 1. On the death of *J* her one-fourth share in the property inherited by her from her husband *A* devolved by succession on *DE* and *K* by operation of s 15(2)(b) read with s 16, r 3. In the result, the contention of *DE* was negatived and *K* was held to be entitled in all to five-eighth share of the entire property.⁴⁰ The fact that *A* had been adopted before 1956 and had a daughter *K* at that time did not make any difference to the position of *K*. She would remain an heir of *A* for purposes of both ss 8 and 15.
- 3 *A* dies leaving surviving him his widow *W*; a daughter *D*; a son *S1*; and *SS1*, *SS2* and *SD*, the two sons and daughter respectively of a predeceased son *S*. *W*, *D* and *S1* will each take one share that is one-fourth; and *SS1*, *SS2* and *SD* will together take one-fourth. The portion of each of them will be one-twelfth of the property left by *A*. Also, see the undermentioned case.⁴¹
- 4 *A* dies leaving surviving him his widow *W*; a son *B*; *CW* widow of a predeceased son *C*; *XW*, *XS*, *XS1* and *XD* the widow, two sons and daughters respectively of a predeceased son *X*; a daughter *D1* and *DS*, *DD* and *DD1* the son and two daughters of a predeceased daughter *D* as appears from the following diagram.

These are among heirs enumerated in Class I of the Schedule and therefore entitled to take the property of *A* simultaneously as his

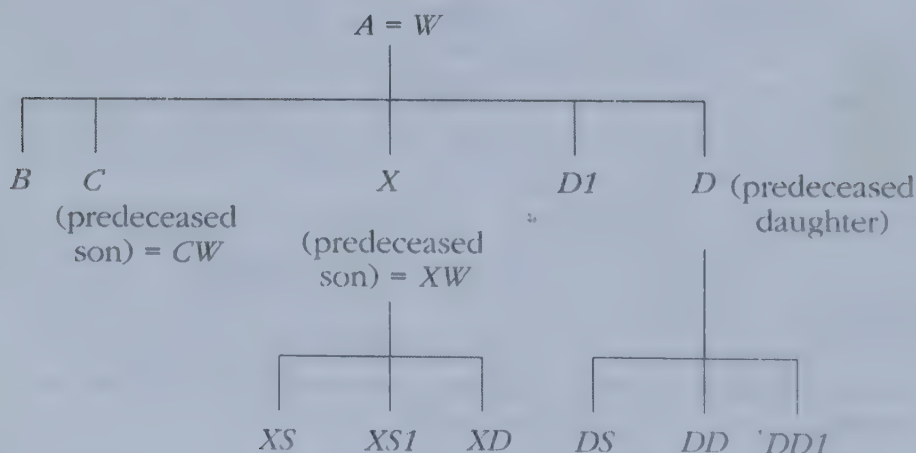
⁴⁰ *Kausalyabai v Devkhai* (1978) Mah LJ 357.

⁴¹ *Taisram v Appuam* AIR 1986 Gau 66 (widow and daughter take equal shares and independent title to their shares-only heirs).

preferential heirs. *W* takes one share in accordance with r 1. *B* and *D1* as surviving son and surviving daughter take one share each in accordance with r 2. The branches of *C*, *X* and *D* get one share each in accordance with r 3. *CW* takes one share as the only heir of *A* in the branch of the predeceased son *C* in accordance with r 3. *XW*, *XS*, *XS1* and *XD* between them take only one share as heirs of *A* in the branch of *X* the predeceased son. *XW*, *XS*, *XS1* and *XD* will each take an equal portion of that one share in accordance with r 4(i).

DS, *DD* and *DD1* between them take only one share as heirs of *A* in the branch of the predeceased daughter *D*, *DS*, *DD* and *DD1* will each take an equal portion of that one share in accordance with r 4(ii). In distribution *W* will take one-sixth; *B* and *D1* will each take one-sixth, *CW* will take one-sixth as constituting the branch of *C*; *XW*, *XS*, *XS1* and *XD* will take a one-sixth share between them as constituting the branch of *X*, that is the portion of each of them will be one-twenty-fourth of *A*'s property; and *DS*, *DD* and *DD1* will take a one-sixth share between them as constituting the branch of *D*, that is the portion of each of them will be one-eighteenth of *A*'s property.

Table 2.1



- 5 In Illustration 4 above if *XS*, one of the sons of *X*, had died during the lifetime of *A* leaving surviving him his widow, sons and daughters or any of them such persons would (as heirs of *A* enumerated in Class D) have got between them in accordance with r 4(i) the same portion that *XS* would have got if he had been alive when *A* died (one-twenty-fourth). So if *XS* had left surviving him a widow, a son and a daughter the portion of each of them would have been one-seventy-second of the property left by *A*. This is in accordance with the last part of r 4(i). The effect of r 3 and 4(i) read together is

that the principle of distribution *per stirpes* also applies to the heirs of the deceased in the sub-branch of a predeceased son of a predeceased son.

- 6 In Illustration 3 above if, *DS*, the son of *D* had died during the lifetime of *A* leaving surviving him his widow, sons and daughters, none of such persons would have got any portion because a daughter's son's widow or a daughter's son's son or a daughter's son's daughter is not an heir (of *A*) enumerated in Class I. The position would have been similar if *XD* the daughter of *A*'s predeceased son *X* had died during the lifetime of *A* because a son's daughter's son or son's daughter's daughter is not an heir enumerated in Class I.

11. Distribution of property among heirs in Class II of the Schedule.—

The property of an intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally.

DISTRIBUTION AMONG HEIRS IN CLASS II OF THE SCHEDULE

Sections 8 and 9, so far as they relate to heirs specified in Class II of the Schedule, contain the explicit declaration of the law that failing all heirs of the intestate specified in Class I of the Schedule, but not until then, his property devolves upon the heirs specified in the nine Entries in Class II of the Schedule. The heir in the first Entry in this class is preferred to those in the second Entry; the heirs in the second Entry are preferred to those in the third Entry and so on in order of the Entries. No question of computation of the shares of the heirs so listed can arise when there is only one heir who is entitled to take the property as belonging to prior Entry in competition with any heir or heirs specified in any subsequent Entry. But where there are more than one heirs of the intestate entitled to take the property on the ground that they are all listed in the same prior Entry in Class II and are therefore entitled to be preferred in competition with other heirs of the intestate in any subsequent Entry in Class II under the rule laid down in s 8 and latter part of s 9, the computation of their shares is to be in accordance with the simple rule of equal distribution of the property among them enacted in this section which may be said to constitute the Statute of Distribution applicable to heirs in Class II. The legislature does not lay down any rule of discrimination between a male heir and a female heir. Thus, for instance a brother and sister mentioned in Entry II in Class II succeed simultaneously.⁴² The expression 'entry' occurring in this section denotes all

⁴² *Satya Charan v Urmila* AIR 1970 SC 1714.

the persons covered by the Roman numeral and that any particular entry in Class II succeed together. Section 19 states the broad general rule that if two or more heirs succeed together to the property of an intestate, they shall take the property:

- (a) save as otherwise expressly provided in this Act, per capita and not *per stirpes*; and
- (b) as tenants-in-common and not as joint tenant.

The present section enacts that the heirs specified in any one Entry in Class II of the Schedule share simultaneously and equally. There is no precedence or priority among the different heirs specified in any one Entry. They all stand *in æquali jura* and take per capita with this qualification that full-blood is to be preferred to half-blood. There is little scope for the contention that the different heirs mentioned in what may be described as sub-divisions of any particular Entry in Class II of the Schedule do not inherit simultaneously. Such a contention was raised in the undermentioned cases⁴³ and was negatived. [See Illust (ii) below. Also, see notes under s 9.] The section does not state under what circumstances heirs in a sub-division of any one Entry take one share and heirs in an other sub-division of that Entry take one share. The equality, therefore, is between every individual heir of the intestate and not between the sub-division (there are no sub-divisions) in any particular Entry. Thus, for instance if the intestate dies leaving surviving him as his heirs only one brother and four sisters who are among the heirs enumerated in Entry II the distribution will be that all the five heirs will share equally.⁴⁴

Illustrations

- (i) In Illust (iv) under s 9 the two brothers and the son's daughter's son who are heirs specified in Entry II will share equally, that is each of them will take one-third of the property of the intestate.
- (ii) A dies leaving surviving him a brother's son and sons and daughters of his sister. They are all heirs in Entry IV of Class II and will take A's property simultaneously and in equal shares.
- (iii) A dies leaving surviving him three daughter's daughter's daughters and a daughter's son's son, former being the grandchildren of his predeceased daughter D and the latter being the grandson of another predeceased daughter D1. The distribution will not be according to the branches of the daughters D and D1 but all the four heirs will share equally, that is, each of them will take one-fourth of the property of the intestate.

⁴³ *Arunachalathammal v Ramachandran* AIR 1963 Mad 255; *Thanthoni Naicker v Kupparammal* AIR 1973 Mad 274 (one brother and five sisters).

⁴⁴ Cited with approval in *Kumara Pillai v Kunjulakshmi Amma* AIR 1972 Ker 66; *Krishana v State of Haryana* AIR 1994 SC 2536.

- (iv) A dies leaving surviving him his father's full-brother, his father's step-brother and three full-sisters of his father. Full-blood is to be preferred to half-blood in this case as the nature of relationship is the same in every other respect. The distribution between the full-brother and the full-sisters of the father, though they belong to what may be described as sub-divisions, will be that they share equally. The brother and the three sisters of the father will each take between themselves one-fourth of the property of the intestate.

12. Order of succession among agnates and cognates.—The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder:

Rule 1.—Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2.—Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3.—Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

13. Computation of degrees.—(1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

SECTIONS 12–13: SUCCESSION AMONG AGNATES AND COGNATES

The rules of preference determinative of the order of succession and those relating to the mode or method of reckoning degrees of ascent or descent, or both are, under the Act common to both the categories of agnates and cognates and are stated in these two sections which may conveniently be read together.

Section 8(c) contains the explicit declaration of the law that failing all heirs of the intestate specified in Classes I and II of the Schedule, but not until then, his property devolves upon his agnates; and s 8(d) declares that

failing all heirs of the intestate specified in Classes I and II of the Schedule and also all agnates, but not until then, his property devolves upon his cognates. Section 8(c) and s 8(d) do not give any authoritative lists of agnates and cognates of the intestate or state the order of succession among them.

The order of succession is left to be worked out in accordance with the rules laid down in ss 12 and 13.

Section 12 lays down three rules of preference, which govern the order of succession among agnates and cognates. Section 13 states the rules in accordance with which degrees of relationship between the intestate and his agnates or his cognates are to be computed. The degree of relationship may be of ascent or descent; or of both, ascent and descent as for instance in case of a father's brother's son who is related to the intestate as father's father's son's son.

In accordance with the rules laid down in s 12, agnates and cognates may conveniently be divided into the following sub-categories or grades:

(A) Agnates

- (i) Agnates who are descendants: they are related to the intestate by no degree of ascent. Such, for instance, are son's son's son's son and son's son's son's daughter.
- (ii) Agnates who are ascendants: they are related to the intestate only by degrees of ascent and no degree of descent. Such, for instance are father's father's father and father's father's mother.
- (iii) Agnates who are collaterals: they are related to the intestate by degrees both of ascent and descent. Such for instance are father's brother's son and father's brother's daughter.

(B) Cognates

- (i) Cognates who are descendants: they are related to the intestate by no degrees of ascent. Such for instance are son's daughter's son's son and daughter's son's son's son.
- (ii) Cognates who are ascendants: they are related to the intestate only by degrees of ascent and no degree of descent. Such for instance are father's mother's father and mother's father's father.
- (iii) Cognates who are collaterals: they are related to the intestate by degrees both of ascent and descent. Such for instance are father's sister's son and mother's brother's son.

It will be noticed that none of the heirs in any of the instances given above are enumerated in Classes I and II of the Schedule.

The effect of the rules laid down in s 12 in the first instance is that agnates in the first grade above are to be preferred to those in the second grade and agnates in the second grade are to be preferred to those in the third grade, and similarly in the case of cognates. It is obvious that most of the heirs in the categories of agnates and cognates would be collaterals

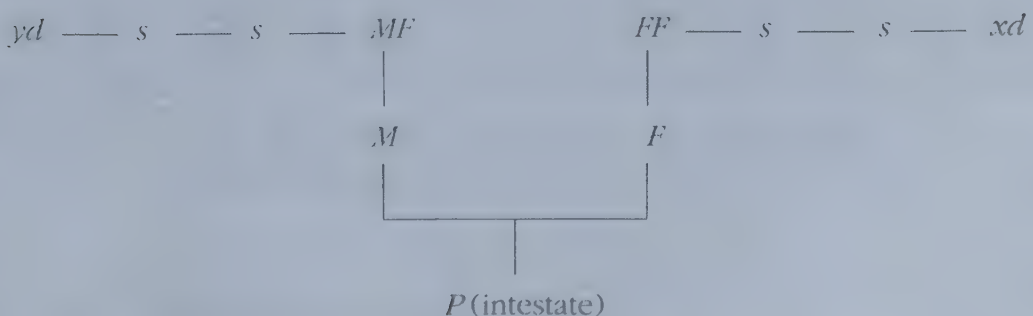
related to the intestate in degrees both of ascent and descent. Collaterals are persons of common descent but by different line.

Computation of Degrees (s 13)

Application of the rules of preference governing order of succession laid down in s 12, supra, involves computation of the degrees of relationship between the intestate and his agnates or cognates. That relationship is to be reckoned from the intestate to the heir in terms of degrees with the (intestate) propositus as the starting point. There is no rule of discrimination or preference between male and female heirs and both male and female relatives by blood or adoption having legitimate kinship with the intestate wholly through males are included among his agnates and all such relatives, male and female, are his cognates where the relationship is not wholly through males but through one or more females. It follows that in case of agnates every intervening person featuring in the reckoning must be a male relative and in the case of cognates at least one female relative must feature and intervene in the reckoning. The computation of degrees of ascent and of descent is to be so made that it is inclusive of the intestate. The relationship must be reckoned from the propositus to the heir on terms of degrees with the propositus as the *terminus a quo*, that is the first degree (s 13(2)). The other rule is that every generation constitutes a degree either ascending or descending (s 13(3)). However, it should be noted that the *order of succession among agnates or cognates is not determined merely by the total of the number of degrees of ascent and descent. It is regulated by the rules of preference laid down in s 12.*

The Hindu mode of computation of degrees under s 13 is retained by the legislature. It is the same as that adopted by the canonists and differs from that adopted in civil law and followed in ss 25 to 28 of the Indian Succession Act. In the latter system of computation, the propositus is excluded and the first degree begins with an ascendant or a descendant.

Table 2.2



The rules of computation are simple but error in reckoning the degrees of relationship between the *propositus* and his collaterals may arise if they are not properly applied. The degrees of relationship with a father's father's father are four in ascent inclusive of the intestate and on similar reckoning the degrees of relationship with a daughter's daughter's daughter are four in descent. In case of a collateral there are degrees both of ascent and descent. In the following diagram the *propositus* is the grandson of *FF* and *xd* is his paternal uncle's son's daughter. She is a collateral and an agnate. *xd* is related to the *propositus* by three degrees of ascent (since the intestate must be included) and three degrees of descent. Similarly *yd* who is the maternal uncle's son's daughter (collateral and a cognate) is related to the *propositus* by three degrees of ascent and three degrees of descent.

The following are further illustrations of the rules of computation of degrees:⁴⁵

- (i) The heir to be considered is the father's mother's father of the intestate. He has no degrees of descent but has four degrees of ascent represented in order by: (a) the intestate; (b) the intestate's father; (c) that father's mother; and (d) her father (the heir).
- (ii) The heir to be considered is the son's daughter's son's daughter of the intestate. She has no degrees of ascent, but has five degrees of descent represented in order by: (a) the intestate; (b) the intestate's son; (c) that son's daughter; (d) her son; and (e) his daughter (the heir).
- (iii) The heir to be considered is the mother's father's sister's son (that is mother's father's father's daughter's son) of the intestate. He has four degrees of ascent represented in order by: (a) the intestate; (b) the intestate's mother; (c) her father; and (d) that father's father and two degrees of descent represented in order by: (a) the daughter of the common ancestor (namely, the mother's father's father); and (b) her son (the heir).

It will be seen that in every case in computing the degrees of ascent or descent the intestate is included as constituting one degree of ascent or descent. It will also be seen that when degrees, both of ascent and descent, are to be computed in case of a collateral, the degrees of ascent computed from the intestate are inclusive of him, but in counting the degrees of descent from the ancestor (or ancestress) only generations of descent are computed, that is, the ancestor (or ancestress) does not constitute a degree of descent. In such a case it is only every generation of descent from the ancestor (or ancestress) that is taken in the computation.

⁴⁵ These three illustrations are adapted from the illustrations to cl 105 of the Hindu Code Bill as amended by the Select Committee.

RULES OF PREFERENCE

The order of succession among agnates and cognates is governed by the three Rules of Preference laid down in s 12 which are common to both the categories of heirs. In order to determine which of the two or more claimants in the category of agnates or of cognates, as the case may be, must be preferred, recourse must be had to rr I and II laid down in s 12 and initially to r I. Where one competing heir is not entitled to be preferred to the other competing heir under r I or r II, they take simultaneously (r III).

Rule 1—This Rule is pivotal and enacts that, of two heirs the one who has fewer or no degrees of ascent is preferred. It applies to all agnates and cognates and means that of two competing heirs in the category of agnates or of cognates—

- (i) the one who has no degrees of ascent, that is, one who is only related to the *propositus* by degrees of descent, is to be preferred to the one who has any degrees of ascent;
- (ii) where both are related to the *propositus* by degrees of ascent, the one who has fewer degrees of ascent is to be preferred to the other.

In case of descendants of the *propositus* there can be no degree of ascent and therefore all such descendants form a grade by themselves from whom and excluding all others the nearest agnate or the nearest cognates, as the case may be, has to be ascertained. As among the descendants the order of succession will be in accordance with r II and that heir is preferred who has fewer degrees of descent. Thus for instance among descendants who are cognates the daughter's daughter's daughter's son is to be preferred to a son's son's son's daughter's son because the former has fewer degrees of descent than the latter. The application of the rule in case of ascendants of the *propositus*, either agnates or cognates, are equally simple. They may be said to belong to the second grade or sub-category as already stated and become entitled to succeed only when there are no descendants of the *propositus* but having no degree of descent, they exclude all collaterals. As regards the ascendants, the order of succession will be in accordance with the initial part of r I that, of two heirs the one who has fewer degrees of ascent is preferred. Thus for instance among agnates, the father's father's mother will be preferred to the father's father's father's father, degrees being only of ascent and four and five respectively. The position of ascendants that are cognates is similar.

The rule is of considerable importance in determining the order of succession among collaterals either agnates or cognates. Among collaterals who may be competing agnates or competing cognates preference is to be given to one who has fewer degrees of ascent than the other and his rule of preference is to be applied regardless of the degrees of descent. It is an

obvious corollary of r I that the order of succession among collateral agnates or collateral cognates is not determined merely by the total of the degrees of ascent and of descent, because of two such heirs preference is given to one who has the fewer degrees of ascent. So among two competing collateral agnates, one who is descended from the nearer ancestor of the intestate is to be preferred, to one who claims descent from a remoter ancestor; and among two competing collateral cognates one who is descended from the nearer ancestor or ancestress of the intestate is to be preferred to one who claims from a remoter ancestor or ancestress. Rule I is pivotal and lays absolute stress on the degrees of ascent; the fewer the degrees of ascent the nearer is the heir, and one with no degree of ascent at all, is a preferred descendant to another having degrees of ascent however few.

Illustrations

- (i) The competing heirs are two collateral agnates: (a) brother's son's daughter (father's son's son's daughter); and (b) paternal uncle's son (father's father's son's son). The former who has only two degrees of ascent is to be preferred to the latter that has three degrees of ascent. It will be noticed that the order of succession among collateral agnates or cognates is not determined by the total of degrees of ascent and of descent because of two such heirs preference is primarily given to one who has fewer degrees of ascent. In this illustration if the degrees both of ascent and descent had to be totalled up both the heirs would have been related to propositus by the same aggregate number of degrees, say, five. But that is not the rule.
- (ii) The competing heirs are two cognates: (a) son's daughter's son's son; and (b) sister's daughter's son (father's daughter's daughter's son). The former who has no degree of ascent is preferred to a collateral.
- (iii) The competing heirs are two collateral cognates: (a) brother's daughter's daughter (father's son's daughter); and (b) mother's sister's son (mother's father's daughter's son). The former who has only two degrees of ascent is preferred to the latter that has three degrees of ascent. Here both the heirs are collaterals and the one with fewer degrees of ascent is preferred, although she is a female.
- (iv) The competing heirs are two collateral cognates: (a) sister's daughter's daughter (father's daughter's daughter's son's daughter); and (b) maternal uncle's son (mother's father's son's son). The former who has only two degrees of ascent is preferred to the latter that has three such degrees.
- (v) The competing heirs are two collateral cognates: (a) mother's sister's son's (mother's father's daughter's son's son); and (b) father's father's

son (father's father's father's son's son). The former who has three degrees of ascent is preferred to the latter that has four degrees of ascent. Here both the heirs are collaterals and the one with fewer degrees of ascent is preferred. It will be noticed that it makes no difference that one heir (the heir preferred) is a cognate *ex parte materna* and the other heir is a cognate *ex parte materna*.

- (vi) The competing heirs are uterine brother, and father's sister's son (father's father's daughter's son). The uterine brother has two degrees of ascent (of the intestate and of his mother) and the father sister's son has three degrees of ascent. The uterine brother is, therefore, preferred. The position would have been the same if instead of the uterine brother the competing heir had been a uterine sister.

Rule II.—This rule enacts that where the numbers of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent. It applies to all agnates and cognates and means that:

- (i) of two heirs who have no degrees of ascent, that is, are descendants, being related to the propositus only by degrees of descent, the one who has fewer degrees of descent is to be preferred to the other;
- (ii) of two heirs who have the same degrees of ascent, the one who has fewer degrees of descent is to be preferred to the other.

This rule though not subordinate to r I, in practice comes into operation only after r I has been applied. In case of competing descendants, the order of succession will be regulated by this rule and the one who has fewer degrees of descent will be preferred. The case of competing ascendants not of the same degrees is governed by r I. The case of competing ascendants of the same degree such for instance as a father's father's father and a father's father's mother will not fall under this rule but r III because both heirs are agnates who are in the same degrees of ascent and there is no question of degrees of descent in their case. The more practical importance of r II is that read with r I it settles the order of precedence and priority among collateral agnates as also among collateral cognates.

Illustrations

- (i) The competing heirs are two collateral agnates: (a) brother's son's daughter (father's son's son's daughter); and (b) brother's son's son's daughter (father's son's son's son's daughter). Both the claimants have two degrees of ascent but the former has three degrees of descent and the latter has four degrees of descent with the result that the former is to be preferred to the latter. The result would have been the same if the claimants had been the brother's son's daughter and brother's son's son's son. A male heir, it will be noticed, is not preferred to a female heir. It will not make any

difference whether the grandchildren and great-grandchildren under consideration are of the same brother of the propositus or of different brothers. Succession here is not governed by any doctrine of representation.

In the undermentioned case,⁴⁶ the heirs were competing collateral agnates. The degrees of ascent were the same and collaterals with five degrees of descent were preferred to those with six or more degrees of descent.

- (ii) The competing heirs are two collateral cognates: (a) sister's daughter's daughter (father's daughter's daughter's daughter); and (b) brother's son's daughter's son (father's son's son's daughter's son). Both the claimants have two degrees of ascent but the former has three degrees of descent and the latter has four degrees of descent, with the result that the former is to be preferred to the latter. If however the competing heirs had been the sister's daughter's daughter and the brother's daughter's son, the case would have been governed by r III and not by r II.
- (iii) The competing heirs are: (a) mother's father's mother; and (b) father's father's sister's son (father's father's father's daughter's son). The number of degrees of ascent in both cases is the same, viz, three, but the former has no degrees of descent while the latter has two such degrees. The former is, therefore, preferred. Here an ascendant cognate (on the mother's side) is preferred to a collateral cognate (on the father's side).⁴⁷
- (iv) The competing heirs are two collateral cognates: (a) sister's son's son (father's daughter's son's son); and (b) brother's son's daughter's son (father's son's son's daughter's son). The number of degrees of ascent in both cases is the same; say, two, but the former has only three degrees of descent while the latter has four degrees of descent. The former is, therefore, preferred.
- (v) The competing heirs are uterine brother and full brother's daughter's son. Both the claimants have two degrees of ascent (counting the intestate and of the intestate's mother in one case and the intestate and the intestate's father in the other), but the uterine brother has only one degree of descent and the other heir has three degrees of descent. The uterine brother is, therefore, preferred. The position would have been the same if instead of uterine brother the competing heir had been the intestate's uterine sister. If, however, the competing heirs had been on the one hand the uterine brother or uterine sister and on the other a full-brother's (or a step-brother's) son or daughter

⁴⁶ *Kuldip Singh v Karnail Singh* AIR 1961 Punj 573.

⁴⁷ Illustrations 3 and 4 have been adapted from illustrations to cl 104 of the Hindu Code Bill as amended by the Select Committee.

or a full-sister's (or step-sister's) son or daughter the position would have been totally different because the uterine brother or uterine sister is only a cognate, whereas the others are heirs enumerated in Class II of the Schedule and therefore entitled to priority.

Rule III.—This rule enacts that where neither heir is entitled to be preferred to the other under r I or r II they take simultaneously. In case of descendants of the propositus either agnates or cognates, the order of succession will be governed by this rule when the competing descendants are so related to the propositus that none of them is entitled to claim greater proximity to the propositus in terms of degrees of descent. In case of ascendants of the propositus, either agnates or cognates, the application of this rule is equally simple. Thus for instance among agnates, a father's father and a father's father's mother both stand in the same degree of ascent, say, four and no degree of descent. There being no rule of discrimination between male and female heirs, neither is entitled to be preferred to the other under r I or r II and must therefore take simultaneously. The same is the position among cognates, for instance, of a father's mother's father and a mother's mother's mother.

The rule is of considerable importance in fixing the order of succession among competing heirs who are collateral agnates or collateral cognates. Among two competing collateral agnates, where both are in the same degrees of decent from the same male ascendant of the intestate, they will take simultaneously. Among two competing collateral cognates, where both are in the same degrees of descent from the same ascendant male or female of the intestate or of different ascendants of the intestate in same degrees of ascent to the intestate, they will take simultaneously as none of them can claim greater proximity to the intestate in terms of degrees of ascent or descent under r I or r II.

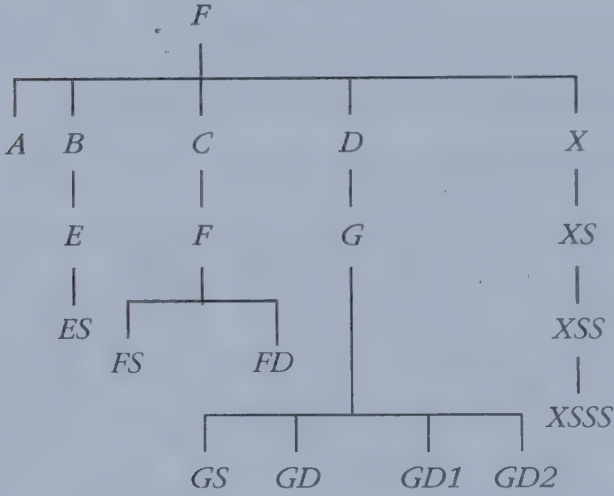
Illustrations

- (i) The competing heirs are two agnates: (a) son's son's son's son; and (b) son's son's son's daughter. There are no degrees of ascent and the number of degrees of descent is the same in case of both. Therefore, neither heir is entitled to be preferred under r I or r II and result is that they take simultaneously. Here, both heirs are descendants and stand in the same degrees of descent.
- (ii) The competing heirs are two cognates: (a) daughter's son's son, and (b) son's son's daughter's son. The position is similar to that in the Illust (i) above and they take simultaneously.
- (iii) The competing heirs are two cognates: (a) father's mother's father; and (b) mother's mother's mother. There are in the same degrees of ascent, say, four, and no degree of descent in case of both. Therefore, neither heir is entitled to be preferred under r I and r

II and the result is that they take simultaneously. Here both heirs are ascendants and stand in the same degree of ascent.

- (iv) The competing heirs are all collateral agnates as appears from the following diagram. *A*, the propositus, had four brothers *B*, *C*, *D* and *X*. *E*, *F*, *G* and *XS* were sons respectively of *B*, *C*, *D*, and *X*. All of them died during the lifetime of the propositus; *E* leaving a son *ES*; *F* leaving a son *FS* and a daughter *FD*; *G* leaving a son *GS* and three daughters *GD*, *GD1* and *GD2*; and *XS* leaving *XSSS* a son of a predeceased son *XSS*. *A* dies intestate leaving surviving him *ES*, *FS*, *ED*, *GS*, *GD*, *GD1*, *GD2* and *XSSS*.

Table 2.3



ES, *FS*, *FD*, *GS*, *GD1* and *GD2* are all grandchildren of *A*'s brothers and have the same degrees of ascent, viz, two, and also the same degrees of descent, viz, three. Among them none is, therefore, entitled to any preference under r I or r II and they must all take simultaneously. They will take per capita and each of them will get one-seventh share in the property of *A*.⁴⁸ *XSSS* has the same degrees of ascent, say, two, four degrees of descent with the result the *ES*, *FS*, *FD*, *GS*, *GD*, *GD1* and *GD2* having fewer degrees of descent are all entitled to be preferred to him under r II. *XSSS*, therefore, is not entitled to succeed to *A* although his father *XSS* if he had been alive at the time of *A*'s death would have ranked with the others.

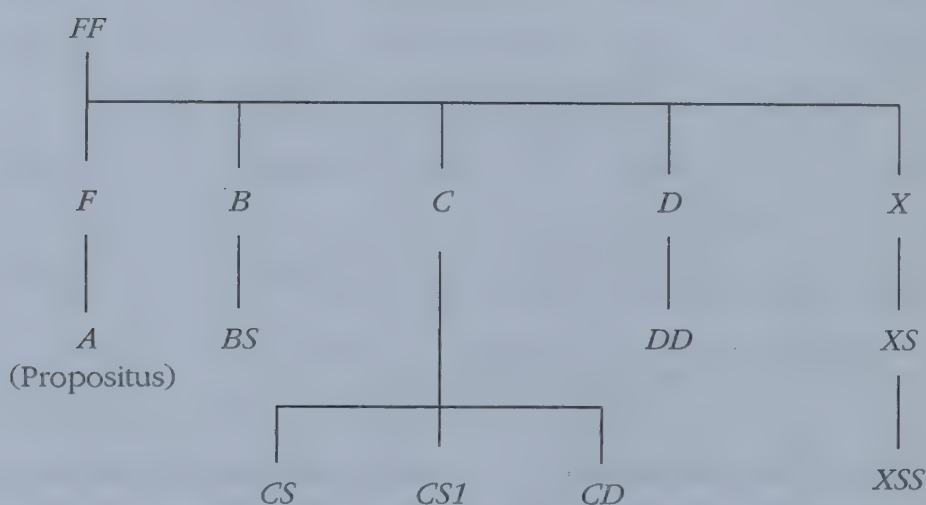
- (v) A similar position will arise if in the above diagram *ES*, *FS*, *FD*, *GS*, *GD*, *GD1*, *GD2*, and *XSSS* are all collateral cognates. Such will be the case if *B* or *E* or both had been females; and *C* or *F* or both had been females; and *D* or *G* or both had been females; and *X*, *XS* and

48 See s 19.

XSS had all or any one or more of them been females. None of the seven heirs *ES*, *FS*, *FD*, *GS*, *GD*, *GD1* and *GD2* is among themselves entitled to any preference under r I or r II and will therefore take simultaneously, each getting one-seventh share in the property of *A*. XSSS is not entitled to succeed to *A* as he has one more degree of descent than the others.

- (vi) The competing heirs are all collateral agnates as appears from the following diagram. *A*, the propositus, had four uncles *B*, *C*, *D* and *X* (brothers of his father) *B*, *C*, *D*, *X* and *XS* (son of *X*) all died during the lifetime of *A*. *A* dies leaving surviving him *BS*, son *B*; *CS*,

Table 2.4



CS1 and *CD*, two sons and a daughter respectively of *C*; *DD*, daughter of *D*; and *XSS* the son of *XS*.

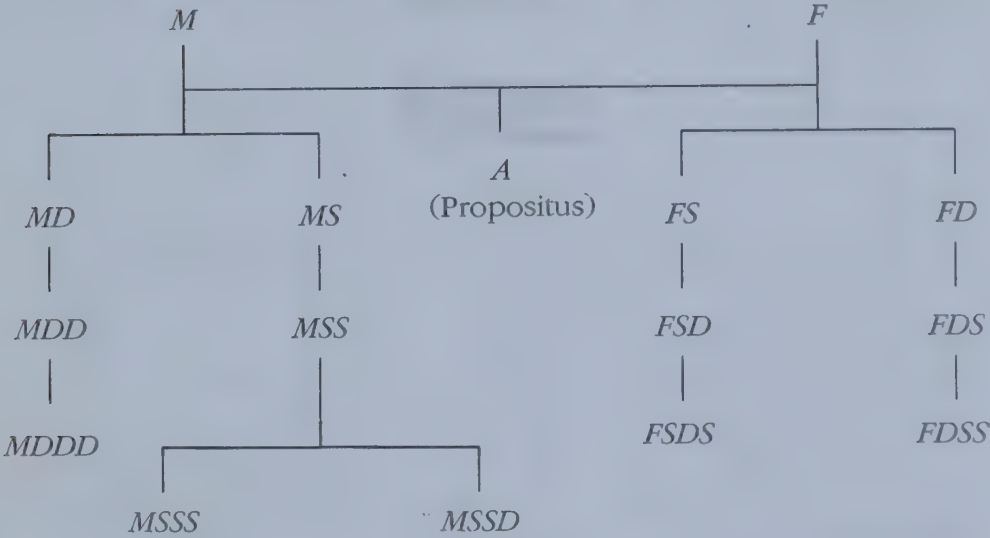
BS, *CS*, *CS1*, *CD* and *DD* are all children of *A*'s father's brothers and have the same degree of ascent, say, three, and also the same degrees of descent, say, two. Among themselves none is, therefore, entitled to any preference under rr I and II and they must take simultaneously. They will take *per capita* and each of them will get one-fifth share in the property of *A*. *XSS* has the same degrees of ascent say, three but three degrees of descent with the result that *BS*, *CS*, *CS1*, *CD* and *DD* having fewer degrees of descent are all entitled to be preferred to him under r II. *XSS*, therefore, is not entitled to succeed to *A*, although if *XS* had been alive at the time of *A*'s death he would have ranked with the others.

- (vii) The competing heirs are collateral cognates: (a) mother's brother's son; (b) mother's sister's daughter; and (c) father's sister's son. All three are in the same degree of ascent, say, three, and the number

of degrees of descent is the same in case of all of them, say, two. Therefore, none of them is entitled to be preferred under r I or r II, and the result is that they take simultaneously.

(viii) The competing heirs are collateral cognates and some of them are related to the intestate by uterine blood as appears from the following diagram:

Table 2.5



FS was the full brother of *A* and *FD* was full the sister of *A*. *A*'s mother had remarried after the death of *A*'s father and *MS* was the uterine brother of *A* and *MD* was the uterine sister of *A*. *FSD* was the daughter of *FS*; *FSDS* was the son of *FD*; *MSS* was the son of the uterine brother *MS*; and *MDD* was the daughter of *MD*, the uterine sister. All of them died during the lifetime of *A*. *A* dies leaving: *FSDS*, the daughter's son of the full brother; *FDSS*, the son's son of the full sister; *MSSS* and *MSSD* the son's son and son's daughter respectively of *MS*, the uterine brother and *MDDD*, the daughter's daughter of *MD*, the uterine sister. Here *MSSS*, *MSSD* and *MDDD* are related to *A* by uterine blood and *FSDS* and *FDSS* are related to *A* by full-blood and they are all collateral cognates. Here both the father and mother of *A* constitute an ascending degree. *FSDS*, *FDSS*, *MSSS*, *MSSD* and *MDDD* are all related to the propositus by the same degrees of ascent, say, two, and are related to him by the same degrees of descent, say, three. Relationship by uterine blood does not create any exclusion in case of cognates. None of the five heirs is entitled to preference under r I or r II with the result that they will all takes simultaneously. They take per capita—each of them will get one-fifth share in the property of *A*.

14. Property of a female Hindu to be her absolute property.—(1)

Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.—In this sub-section, ‘property’ includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Under the Hindu law in operation prior to the coming into force of this Act, a woman’s ownership of property was hedged in by certain delimitations on her right of disposal by acts *inter vivos* and also on her testamentary power in respect of that property. Doctrinal diversity existed on the subject. The ancient texts purported to enumerate heads of *stridhana*, but without comprehensive signification. Some of the expressions used in those texts were merely supplementary and there was no logical classification. Divergent authorities only added to the difficulties surrounding the meaning of a term to which it sought to give a technical significance. The result was that, a term not difficult to comprehend in its etymological sense came to be understood in a narrower and arbitrarily limited connotation. Absolute power of alienation was not regarded, in case of a female owner, as a necessary concomitant of the right to hold and enjoy property and it was only in case of property acquired by her from particular sources that she had full dominion over it. Even so the ancient law laid down in the texts and interpreted by the *nibandhakars* was considerably more liberal in its recognition of her power of alienation, than the rules of Roman law affecting a woman’s *peculiam* and other systems of law under which, till recent times, incorporated and merged the legal existence of the wife during coverture with that of the husband. The restrictions imposed by Hindu law on the proprietary rights of a woman depended on her status as a maiden, as a married woman and as a widow. They also depended on the source and nature of the property. The order of succession to *stridhana* was different from that in case of property of a male owner and it varied under the different schools. All this gave rise to a branch of law—the most complicated of its kind—one which till the

passing of the present Act continued to be regarded as a complex and very difficult subject. As already pointed out in the Introductory Note to the Act, there was some fragmentary legislation,⁴⁹ which only added to the number of anomalies already existing and gave rise to conundrums.

Section 14(1) is not violative of art 14 or 15(1) of the constitution. Nor is it incapable of implementation.⁵⁰

SCOPE AND AMBIT

The rule laid down in sub-s (1) has very wide and extensive application and has to be read in a comprehensive manner. The Act overrides inter alia, the old law on the subject of *stridhana* in respect of all property possessed by a female, whether acquired by her before or after the commencement of the Act and this section declares that all such property shall be held by her as full owner. The Act confers full heritable capacity on the female heir and this section dispenses with the traditional limitations on the powers of a female Hindu to hold and transmit property. The effect of the rule laid down in this section is to abrogate the stringent provisions against the proprietary rights of a female which are often regarded as evidence of her perpetual tutelage and to recognise her status as independent and absolute owner of property. A qualification to the rule is laid down in sub-s (2), but it does not relate to the incidents of woman's property.

In *Punithavalli v Ramalingam*,⁵¹ the Supreme Court pointed out that the estate taken by a female Hindu under sub-s (1) is an absolute one, and is not defeasible and its ambit cannot be cut down by any text or rule of Hindu law or by any presumption or any fiction under that law.

In *Eramma v Veerupana*,⁵² the Supreme Court examined the ambit and object of this section and observed:

The property possessed by a female Hindu, as contemplated in the section, is clearly property to which she has acquired some kind of title, whether before or after the commencement of the Act. It may be noticed that the *Explanation* to s 14(1) sets out the various modes of acquisition of the property by a female Hindu and indicates that the section applies only to property to which the female Hindu has acquired some kind of title, however restricted the nature of her interest may be. The words 'as full owner thereof and not as a limited owner' in the last portion of sub-s (1) of the section clearly suggest that the legislature

49 Hindu Women's Rights to Property Act 1937.

50 *Pratap Singh v Union of India* AIR 1985 SC 1691, *Amar Singh v Baldev Singh* AIR 1960 Punj 666 (FB). The section applies to all 'property' including agricultural lands and is a valid legislation.

51 AIR 1970 SC 1730.

52 AIR 1966 SC 1879.

intended that the limited ownership of a Hindu female should be changed into full ownership. In other words, s 14(1) of the Act contemplates that a Hindu female, who, in the absence of this provision, would have been limited owner of the property, will now become full owner of the same by virtue of this section. The object of the section is to extinguish the estate called 'limited estate' or 'widow's estate' in Hindu law and to make a Hindu woman, who under the old law would have been only a limited owner, a full owner of the property with all powers of disposition and to make the estate heritable by her own heirs and not revertible to the heirs of the last male holder... It does not in any way confer a title on the female Hindu where she did not in fact possess any vestige or title.⁵³

The trend of more recent decisions of the Supreme Court has been to lay stress on the Explanation to sub-s (1). In one such decision, the Supreme Court adopted the approach of giving 'a most expansive interpretation' to the sub-section with a view to advance the social purpose of the legislation which is to bring about a change in the social and economic position of women.⁵⁴

The section should be read with s 4 which gives overriding effect to the provisions of this Act with respect to all matters dealt with in the Act and also enumerates matters which are not affected by this Act. Reference may also be made to s 5.

The expression 'female Hindu' in the section would, as explained by the Supreme Court, in *Vidya v Nand supra*, mean and include any female hindu. A daughter being a female Hindu would be covered within the ambit of the section. Thus when a father put his daughter in possession of property, such daughter would become full owner on this Act coming into force.⁵⁵

The expression 'any property possessed by a female Hindu' read with the expression 'in any other manner whatsoever' in the explanation to the sub-section is wide enough so as to envisage a female Hindu coming into possession of property otherwise than by the modes prescribed in the earlier part of the explanation. The use of the above words demonstrates that the legislature also envisaged other legal modes by which a female Hindu could come into possession of property.

Female Hindu

The use of the term 'female Hindu' in the section was recently interpreted by the Supreme Court.⁵⁶ In that case, a husband had executed a will bequeathing

⁵³ Reference may also be made to notes under as to 'vestige of title' or 'vestige of interest'.

⁵⁴ *Vaddeboyina Tulasamma v Sesbi Reddi* AIR 1977 SC 1944, see per Bhagwati J at pp 1945-47; *Vijiya v Thakorbbhai* AIR 1979 SC 993; *Jagannathan Pillai v Kunjithapadam Pillai* AIR 1987 SC 1493.

⁵⁵ *Jose v Ramakrishna Nair Radhakrishnan* AIR 2004 Ker 16.

⁵⁶ *Vidya v Nand Ram* (2001) 10 SCC 747; *Dhanishtha Kalita v Ramakanta* AIR 2003 Gau 932.

the property to his daughter from his second wife. The same property was also bequeathed to his three wives in lieu of maintenance, which was however qualified and restricted to their lifetime. One of the widows who was alive at the time when this Act came into force, further bequeathed her share in the property to her son from a previous marriage. It was held that since the widow became a full owner of her share, the disposition on the son was valid. It was contended that this section would have no application, as under Hindu law, a man cannot have more than one wife. It was further contended that it was only the first wife who could claim maintenance. This submission was repelled stating that the words 'female Hindu' could not be read only as 'wife'. It was held that such an interpretation would place a very constricted meaning to the words 'female Hindu', which would mitigate against the plain meaning of the section.

A full bench of the Punjab High Court⁵⁷ has held that the section provides enlarged rights over 'land' to Hindu females on the ground that it enacts law on a matter of special property of females.

A Division Bench of the Allahabad High Court,⁵⁸ overruling its earlier decisions, has held that the provisions in the present section are inapplicable to land tenures under the UP Zamindari Abolition and Land Reforms Act.

Reference may be made to decisions noted under s 4.

PROPERTY OF FEMALE TO BE HER ABSOLUTE PROPERTY

This section explicitly declares the law that a female holds all property in her possession whether acquired by her before or after the commencement of the Act as an absolute owner and not as a limited owner. The rule applies to all property movable and immovable howsoever and whenever acquired by her, but subject to the qualification mentioned in sub-s (2).

CO-WIDOWS

Since this section makes it very explicit that property possessed by a female Hindu whether acquired by her before or after the commencement of this Act, shall be her absolute property, even in case of co-widows who are bequeathed property under the will of their husband, such widows would succeed to the estate in equal shares and therefore as common owners and not joint owners. If such widows are common owners at the time the Act came into force and are in possession of their respective

⁵⁷ *Joginder Singh v Kehar Singh* AIR 1965 Punj 407 (FB).

⁵⁸ *Prema Devi v Joint Director Consolidation* AIR 1970 All 238, *Biswanath v Badam Kaur* AIR 1980 SC 1329

undivided half share, both widows become absolute owners of their respective half shares.⁵⁹

Illustrations

- (i) *A* governed by Mitakshara School died after the Hindu Woman's Rights to Property Act 1937, came into force but before the commencement of the present Act, leaving surviving him *W*, his widow, *B* and *C* his two sons and *SSW* the widow of *SS* a predeceased son of his predeceased son *S*. At the time of his death *A* was joint with his sons *B* and *C* and the family owned property. Both *S* and *SS* had been members of the joint family at the time of their death and *S* had predeceased *SS* leaving surviving him as his only son. *A* also left separate property. Both *W* and *SSW* had acquired the same interest in the joint family property which *A* and *SS* respectively had [s 3(2) of the Act of 1937], but the interest which devolved on them was the limited interest known as Hindu Woman's Estate [s 3(3) of the Act 1937]. In the separate property which *A* left, *W* and *SSW* had acquired equal shares with the two sons *B* and *C* by right of inheritance [s 3(1) of the Act of 1937], but the interest which devolved on them by inheritance was the limited interest known as Hindu woman's estate. There was partition of the joint family property and division of *A*'s separate property between *B*, *C*, *W* and *SSW* soon after *A*'s death and before the commencement of the present Act. It was stated in the deed of partition that *W* and *SSW* took only limited interest in the property allotted to them. The effect of the present section is to enlarge that limited interest of *W* and *SSW* into full ownership.⁶⁰

The result will be similar if *A* has been governed by Dayabhaga School although the case would have been affected only by s 3(1) and s 3(3) of the Act of 1937. The result will be similar where *A* was governed by the Mysore Act 10 of 1933.⁶¹

- (ii) *A* governed by Mitakshara School died after the Hindu Women's Right of Property Act 1937 came into force, but before the commencement of the present Act, leaving surviving him his widow *W* and his son *S*. The son alienated certain lands in 1962. In a suit filed by *W* challenging the alienation it was held that the son had

⁵⁹ *Kuppusami v Authorised Officer* AIR 1996 SC 2816; *Bulaki v Lal Dhar* (1997) 9 SCC 274 (where two widows succeeded jointly).

⁶⁰ *Asbaram v Sarjubai* AIR 1976 Bom 272 affords another instance of a similar nature; *Rahari Hamira v Bai Mani* (1979) Guj LR 729; *Chokalingam v Alamelu Ammal* AIR 1982 Mad 29.

⁶¹ *Hanumakka v Dase Gowda* AIR 1976 Kant 30.

no right to transfer the half share of *W* of which she had become an absolute owner.⁶²

- (iii) A Hindu governed by the Banaras School died before 1937 leaving a widow, a daughter and a paternal uncle's sons. Prior to the commencement of this Act the widow surrendered her interest in the property inherited by her and handed over possession of it to her daughter. The surrender was valid but according to the Banaras School the daughter though in possession took a limited estate, in other words, she did not take the property absolutely. Under the old law, on the death of the daughter, the property would have passed to the uncle's son. The effect of the present section is that from the date of the commencement of the Act the daughter holds the property as full owner and if she does not dispose of it during her lifetime it will devolve on her heirs.
- (iv) A governed by Mitakshara School, died in 1934, leaving surviving him his widow. He also left some ancestral lands. The widow adopted a son *J* in 1964. It was held that by operation of this section she was an absolute owner of the property and the adopted son got no interest in the same and the fact that it had been ancestral property in the hands of *A*, before the commencement of the 1937 Act, made no difference since it was not a joint family property at the date of adoption.⁶³

'ACQUIRED'—MEANING OF

The word 'acquired' in sub-s (1) is to be given the widest possible meaning. This is amply borne out by the very comprehensive language used in the Explanation to the sub-section.⁶⁴ The object of this section, as already pointed out, is to declare a Hindu widow, in cases falling under the section, to be the absolute owner of the property; the section puts her *in aequali jura*.⁶⁵

62 *Jagaribai v Ramkhalawan* AIR 1976 MP 106; *Narasimbachari v Andalammal* AIR 1979 Mad 31, *Amar Kaur v Raman Kumari* AIR 1985 P&H 86; *Chokalingam v Alamelu Ammal* AIR 1982 Mad 29 (it makes no difference whether the widow's share had been defined by partition or not. It becomes her absolute property and on her death, it would pass on to her heirs. The owner had died leaving a widow, a son and a daughter).

63 *Kesharbai v State of Maharashtra* AIR 1981 Bom 115 (FB); notes under s 12 of the Adoption and Maintenance Act and see Illust (c).

64 *Badri Pershad v Kanso Devi* AIR 1970 SC 1963, *Munnalal v Rajkumar* AIR 1962 SC 1493, *Rangaswami v Chinnammal* AIR 1964 Mad 387 (interest acquired under Hindu Women's Right to Property Act 1937). Mere mention of names in records in favour of the female would not amount to acquisition of the property by her: *Narayanrao v State of Maharashtra* AIR 1981 Bom 271.

65 *Vinod Kumar v State of Punjab* (1982) PLR 337 (FB).

‘...POSSESSED BY A FEMALE HINDU, WHETHER ACQUIRED BEFORE OR AFTER THE COMMENCEMENT OF THIS ACT’

The expression ‘possessed’ in the initial part of the section appears to have been deliberately used by the legislature. The radical change intended to be made in the limited connotation of the woman’s property and the distinct departure from the old law speaking generally has the effect of converting limited ownership where it existed into absolute ownership. The necessary consequence of the altered law will immediately affect the incidents of woman’s property not merely in respect of property that might be acquired and held by a female after the coming into force of the Act, but also in respect of property already acquired by her in the past and possessed by her. In that sense the operation of the law has been carried back and the section can be said to have been given retrospective effect.⁶⁶

In *Harish Chandra v Triloki Singh*,⁶⁷ the Supreme Court pointed out that by reason of the expression ‘whether acquired before or after the commencement of this Act’ the section is retrospective in effect.

ALIENATION OF PROPERTY MADE BY A FEMALE BEFORE COMMENCEMENT OF THE ACT

The interpretation of the expression ‘possessed’ in the present context has considerable bearing on the question of alienations of property made by a female before the commencement of the Act when such alienations were liable to be set aside at the instance of persons other than the alienor. In case of any alienation of property or surrender of her interest made by a female having only the limited estate of a Hindu woman, alienation or surrender could be challenged on certain grounds and by certain persons (reversioners). The question arose whether after the coming into operation of the Act it was open to the reversioners to challenge the validity of any alienation made by a widow when the alienation was liable to be set aside under the old law. The answer to this would seem to be in the affirmative.

There was, however, considerable diversity of judicial opinion of the meaning and effect of the expression ‘possessed’ in the phrase ‘possessed by a female Hindu, whether acquired before or after the commencement of this Act...’. No difficulty could be likely to arise in respect of property acquired by a female after the commencement of the Act, as it is clear that any such property would be held and possessed by her as full owner except where a restricted estate is prescribed as provided for in sub-s (2). However, controversy arose in respect of property acquired by her before

⁶⁶ This passage was quoted with approval in *Mohari v Chukli* AIR 1960 Raj 82, 85.

⁶⁷ AIR 1957 SC 444.

the commencement of the Act, when such property was not in her possession and had already been alienated by her or her interest in it had otherwise ceased to exist at the date when the Act came into force.

In some earlier decision of the Patna High Court,⁶⁸ subsequently reversed by a full bench of the same High Court,⁶⁹ and a decision of the Allahabad High Court,⁷⁰ the view was taken that the section has been made expressly retrospective and declares that any property acquired by a Hindu female at any time whether before or after the commencement of the Act is to be her absolute property with the result that a reversioner recognised as such under the Hindu law is no more a reversioner as to any property possessed by her at any time and that after the coming into force of the Act a reversioner has no right of reversion or *spes successions*. In a case decided by that court a Hindu female had executed a sale deed in favour of certain persons and those persons had subsequently mortgaged the property in favour of another person and the plaintiff as reversioner brought a suit for declaration that the sale deed executed by her was without consideration and without any legal necessity and not binding upon him. The lower courts decreed the plaintiff's claim and the present Act came into force during the pendency of the appeal before the High Court. It was held that the plaintiff had lost his right as a reversioner and his suit was dismissed. The view was expressed that the reversioner has in any such case no locus standi to bring or continue, a suit challenging the alienation on any ground. According to the Allahabad High Court even where a reversioner in any such case obtained a declaratory decree before the Act came into force the decree could not be maintained after the commencement of the Act on the ground that any such declaration was rendered futile by the Act and that the effect of the Act was that there were no reversioner at all and there could be no question of the alienation, howsoever illegal it maybe, not being binding on the reversioners. The widow would continue to be estopped from challenging the validity of the alienation and the reversioners would have completely disappeared by virtue of the provisions of the Act. The customary law of succession had been completely abrogated by the Act and the next reversioner, it was observed, was a creation of the customary law, and was no longer in the picture. The opinion was also expressed that the heirs of the widow who replaced the reversioner cannot challenge the alienation.⁷¹

68 *RA Missir v Raghubath* AIR 1957 Pat 480; *Janki Kuer v Chharthu Prasad* AIR 1957 Pat 674; *Julam Missir v Pradip Missir* AIR 1958 Pat 115; *Bajinath v Ramautar* AIR 1958 Pat 227; *Ramsaroop v Hiralall* AIR 1958 Pat 319.

69 *Harak Singh v Karlish Singh* AIR 1958 Punj 581 (FB), *Sheopujan v Ramsenak* AIR 1963 Pat 330.

70 *Hanuman Prasad v Indrawati* AIR 1958 All 304; dissented from in *Rameshwar v Hardas* AIR 1964 All 308.

71 *Hanuman Prasad v Indrawati* AIR 1958 All 304.

The contrary view taken by the High Courts of Andhra Pradesh,⁷² Madras,⁷³ Calcutta,⁷⁴ Bombay,⁷⁵ Madhya Pradesh,⁷⁶ Punjab,⁷⁷ Orissa,⁷⁸ Kerala,⁷⁹ Gujarat,⁸⁰ and Mysore⁸¹ was to the effect that the section does not purport to enlarge an estate determined before the commencement of the Act or to enlarge an estate conveyed to alienees by the limited owner before the date of the coming into operation of the Act in 1956 and that the court would not be justified in holding that even in such cases the 'reversioner' has no locus standi or that the rights of the 'reversioner' were wholly abrogated.

Reference may be made to notes under 'Reversioners' *infra*.

In *Kotturuswami v Veerava*,⁸² the Supreme Court expressed, in the context of property acquired by a widow before the commencement of the Act, its approval of and agreement with the view taken by the High Court of Calcutta, that the opening words of the s 14, that is, 'property possessed by a female Hindu,' obviously mean that to come within the purview of the section, the property must be in possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's possession when the Act came into force. The possession might have been either actual or constructive or in any form recognised by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into an absolute estate under this particular section, was at least in such possession, taking the word 'possession' in its widest connotation, when the Act came into force, the section would not apply. The Supreme Court also observed that in its later Full Bench decision the Patna High Court had 'rightly pointed out that the object of the Act was to improve the legal status of Hindu women, enlarging their limited interest in property inherited or held by them to an absolute interest, provided they were in possession of the property when the Act came into force and,

72 *Venkayamma v Veerayya* AIR 1957 AP 280.

73 *Marudakkal v Arumugha* AIR 1958 Mad 255, (1958) ILR Mad 354, (1958) 1 Mad LJ 101.

74 *Gostha Behari v Haridas* [1957] AC 557; *Krishna Dassi v Akhil Chandra* [1958] AC 671; *Sen Mondal v Chanchal Dasi* 1980 CWN 461 (property already alienated); *Sankar Prasad v Ushabala* AIR 1978 Cal 525.

75 *Ramchandra v Sakbaram* AIR 1958 Bom 244.

76 *Lukai v Niranjana* AIR 1958 MP 160 (FB); *Janku v Kisan* AIR 1959 MP 1.

77 *Amar Singh v Sewa Ram* AIR 1960 Punj 530 (FB), (1960) ILR 2 Punj 343; *Mukhtiar Kaur v Kartar Kaur* AIR 1966 Punj 31.

78 *Sansir Patelin v Satyabati Naikani* AIR 1958 Ori 75, (1957) ILR Cut 700.

79 *Chandrasekhar v Sivaramakrishnan* AIR 1958 Ker 142.

80 *Kamala v Ochhavlal* AIR 1965 Guj 84.

81 *Damodar Rao v Bhima Rao* AIR 1965 Mys 290.

82 1959 Supp (1) SCR 968, AIR 1959 SC 577, (1959) SCJ 437; *Radha Rani v Hanuman Prasad* AIR 1966 SC 216; *Hussain Uduman v Venkatachala Mudaliar* AIR 1975 Mad 8; *Mahabir Pandey v Sashi Bhusan* AIR 1981 Cal 74 (female having limited interest—RS Khatian gifted property after 1956 to daughter—transferee from daughter acquired valid title).

therefore, in a position to take advantage of its beneficial provisions; but the Act was not intended to benefit alienees who with their eyes open purchased the property from the owners without justifying necessity before the Act came into force and at a time when the vendors had only a limited interest of Hindu women'.

In *Jagannathan Pillai v Kunjitha Padam Pillai*,⁸³ decided by the Supreme Court it was held that since the section in terms applied even to property which was acquired 'after' the commencement of the Act no question of the property being in possession of the female concerned on the date of the commencement of the Act can arise and it would suffice if she was in possession of the property when the claim to be the absolute owner of the same was challenged. The decision of the Supreme Court in *Kotturuswami v Veeravva* referred to above was explained and distinguished. The undermentioned decisions of the Orissa⁸⁴ and Andhra Pradesh⁸⁵ were overruled and approval was expressed of the undermentioned decisions of the Madras,⁸⁶ Punjab,⁸⁷ and Gujarat⁸⁸ High Courts. The factual background of the cases as summarised by the Supreme Court was that a widow had transferred the property in question in favour of an alienee by a registered document before commencement of the Act and the property was, after 1956, re-transferred to her by a registered document thus restoring to the widow the interest (such as it was) which she had parted with earlier by reversing the original transaction. Thus, she was in possession of the property which she had inherited from the husband, having by, then re-acquired and regained what she had lost.

'POSSESSED'—MEANING OF

The word 'possessed' is used in this section in a broad sense and in its widest connotation and as pointed out by the Supreme Court in *Kotturuswami v Veeravva Jagannathan Pillai*'s case above it means 'the state of owning or having in one's hand or power'. It need not be actual physical possession or personal occupation of the property by the female but may be possession in law. It may either be actual or constructive or in any form recognised by law. Thus, for instance the possession of a licensee, lessee or a mortgagee from the female owner would be her possession for the purpose of this section. Such also would be the case where a person is in possession as an agent of the female owner and is accountable to her. It will be seen from

83 AIR 1987 SC 1493.

84 *Ganesh Mahanta v Sukhia Bewa* AIR 1963 Ori 163.

85 *Madicherla Venkatarathnam v Siddani Palamma* (1970) 2 Andh WR 201.

86 *Chinnakolandi v Thanji* AIR 1965 Mad 497.

87 *Teja Singh v Jagat Singh* AIR 1964 Punj 403.

88 *Bai Champa v Chandrakant* AIR 1973 Guj 227.

the undermentioned cases⁸⁹ that the courts have given the widest connotation to the expression 'possessed'. In *Mangal Singh v Rattno*,⁹⁰ the Supreme Court pointed out that the section covers all cases of property owned by a female Hindu although she may not be in actual, physical or constructive possession of that property, provided of course that she has not parted with her rights and is capable of obtaining possession of the property. In that case a Hindu widow came into possession of land on the death of her husband in 1917 and continued in possession until 1954 when she was wrongfully dispossessed and filed a suit on 12 March 1956 and died in 1958. It was held that on coming into force of the Act in 1956 after institution of the suit she must be regarded as a female Hindu who possessed the property for the purpose of this section and as one who became full owner of it. In any such case, the female owner would be regarded as being 'possessed' of the property, if the trespasser has not perfected his title by adverse possession before the Act came into force.⁹¹

It is thus evident that for a widow to be 'possessed' of property on the commencement of this Act, she must be in possession of such a property either actual, physical or constructive. If, however, such widow has parted with her rights to the property by way of a gift or any devise which has the effect of extinction of her rights to the property before the commencement of this Act, the widow not being 'possessed' of the property on the date when the Act came into force, such widow would have no title to the property whatsoever and cannot thus avail of the beneficial provisions of this section.⁹² When the husband of the widow died much prior to the coming into force of the Hindu Womens Right to Property Act 1937 leaving behind two sons and the wife, the property would devolve on the sons in equal shares and the widow would not become the absolute owner as she was not even in constructive possession of the property.⁹³

89 *Sampathakumari v Lakshmi Ammal* AIR 1963 Mad 50; *Arumuga v Nachemuthu* AIR 1958 Mad 459 (widow was mortgagor: became absolute owner); *Jai Ram v Tota Ram* AIR 1961 Punj 395 (constructive possession through mortgagee); *Thakur Ram Janki v Jago Singh* AIR 1962 AP 131; *Krishna Dassi v Akhil Chandra* AIR 1958 Cal 671 (receiver in mortgage suit); *Annapurna v Kalpana Debi* AIR 1972 Gau 107; *Baswant Gauda v Channabasawwa* AIR 1971 Mys 151 (invalid adoption before Act: widow held to be in possession); *Ladhi Bai v Thakur Shiriji* AIR 1968 Raj 41 (will by widow before Act came into force); *Rangaswami v Chinnammal* AIR 1964 Mad 387; *Koduri Venkata Subbaiah v Rangaiah* AIR 1972 AP 240 (invalid settlement deed executed by widow in 1937: possession of donee treated as her possession).

90 AIR 1967 SC 1786; *Manmoyee Baramani v Upeswari* AIR 1994 Gau 18.

91 *Gopalkrishnan v Ramulu Reddi* (1965) 1 Mad LJ 579; *Sivaiah v Tekchand* AIR 1966 AP 305 (title in widow by inheritance but possession of trespasser); *Anandibai v Sundarabai* AIR 1965 MP 85 (co-widows: possession of trespassers); *Gulabchand v Sheokaran Lal* AIR 1964 AP 45 (widow in adverse possession); *Harmal Kaur v Kartar Kaur* AIR 1968 P&H 295; *Rajendra Nath v Shiv Nath* AIR 1971 All 118.

92 *Munshi Singh v Sohan Bai* AIR 1989 SC 1179.

93 *Naresh Jha v Rakesh Kumar* AIR 2004 Jhar 2.

The right which was conferred on the widow by s 3 of the Hindu Women's Right to Property Act 1937, as has already been pointed out, was not a right which was inchoate or imperfect till a claim for partition was made. The undivided interest of the husband in the joint family property devolved upon the widow immediately on the death of the husband and in the eyes of law she would be in possession of her interest in that property. The effect of the present section is to transform that statutory interest of the widow of which she was a limited owner into that of a full owner. The fact that she had not sought any partition before the present Act came into force in 1956 makes no difference.⁹⁴ Similarly, where at the time of her death the widow was in possession of her share of the property to which she became entitled under the Hindu Women's Right to Property Act 1937, that share or that property would devolve upon her heirs and the latter would be entitled to prosecute a suit for partition filed by the widow.⁹⁵ On the same principle it was held by the Supreme Court that the share of a widow declared by a preliminary decree in a partition suit before the commencement of the present Act, is a share 'possessed' by her and if she dies before actual division of the estate, the interest declared in her favour will devolve upon her heir as property of which she was in possession at the time of her death and within the contemplation of the present section.⁹⁶ The same principle has been applied to analogous cases where she had acquired interest in any property by virtue of the operation of the Act of 1937 and this irrespective of any actual partition having been effected or not. The mere superimposition of a partition deed or consent decree or an award in any such case would not take the matter out of the purview of sub-s (1) simply because her interest there was described as limited interest.⁹⁷

94 *Sankara Rao v Rayyalakshamma* AIR 1961 AP 241; *Narasimbachari v Andalammal* AIR 1979 Mad 31; *Billabasini v Dulal* AIR 1958 Cal 472; *Bhawar Singh v Pilabai* AIR 1972 MP 204 (wife's right to share on a partition although not impleaded in partition suit); *Hanumappa v Dase Gowda* (1975) 25 Kant 175 (s 8 of Mysore Hindu Law Women's Property Act 1933: no bar to sue for partition).

95 *Subbalakshmi v Ramalakshmi* AIR 1961 Mad 76, (1963) 2 Mad LJ 167; *Banarsi v Marcebia* AIR 1967 AP 340; *Ranganayakamma v Rajeshwaramma* AIR 1961 AP 380 (widow in possession under compromise with husband who died after the 1937 Act); *Shib Dai v Ghauri Lal* AIR 1965 J&K 11, it was held that if in law the property had not vested in any other person the widow could be deemed to be in possession.

96 *Munnalal v Rajkumar* AIR 1962 SC 1493.

97 *Badri Pershad v Kanso Deri* AIR 1970 SC 1963 (partition by award widow gives shares as widow's estate; husband died in 1947); *Munnalal v Rajkumar* AIR 1962 SC 1493; *Dulei Bewa v Bimali Bewa* AIR 1964 Ori 33; *Lalchand v Sushila* AIR 1962 Cal 623; *Satyanarayana v Seethamma* AIR 1972 Mys 247; *Saraswathi v Anantha* AIR 1966 Ker 66; *Saraswathi Ammal v Krishna Iyer* AIR 1965 Ker 226 (property given to brother's widow under a partition); *Kaliammal v Ardiammal* AIR 1965 Mad 451; *Indubai v Vyankati* AIR 1966 Bom 64; *Udhav Shankar v Tarabai* AIR 1968 Bom 308 (consent decree in partition suit); *Jagannathapuram Guru v Godabat* AIR 1968 Bom 25; *Raghunath v Bhimsen* AIR 1965 Ori 59, *Purna Chandra v Nimai Charan* AIR 1968 Ori 196 (partition deed).

In any such case she becomes full owner in respect of that interest and as such she acquires by virtue of this section, a right unlimited in point of user and duration and uninhibited in point of disposition.⁹⁸ In *Sukhram v Gauri Shankar* case, decided by the Supreme Court, *H* and *S*, two brothers and *C*, the son of *S*, constituted a joint Hindu family governed by Mitakshara law of the Banaras School. *H* died in 1952 leaving surviving him his widow *K*. In December 1956, after this Act came into force, *K* sold half the share in a house and a shop belonging to the joint family. In a suit by *S* and *C* challenging the sale it was held that *K* having become full owner of her husband's interest was competent to effect the sale. Compensation awarded in respect of property in the possession of a widow, who had not at the date of the acquisition, absolute interest therein, and kept under the provisions of the Land Acquisition Act with the Land Acquisition Court on the date when the present Act came into operation in 1956, is property 'possessed' by her within the meaning of the section.⁹⁹

The rule that the section is applicable where the female Hindu was in possession of the property and had acquired some kind of title, however restricted the nature of her interest may be, was applied in a full bench decision of the High Court of Delhi.¹ In that case, a Hindu widow made a gift of property, which she held as a limited owner to her daughter. At the date of the Act coming into force, the daughter was in possession of the property and it was held that the daughter became full owner of the same. Overruling the decision of the Full Bench of the Delhi High Court, the Supreme Court in the case of *Kalawatibai v Soiryabai*,² held that a female Hindu possessed of the property on the date the Act came into force could become an absolute owner only if she was a limited owner at the time of the commencement of the Act. It was held that the legislature did not intend to extend the benefit of enlargement of estate to every female Hindu irrespective of whether she was a limited owner or not.³ Such benefit can, of course be availed of by a widow who has been bequeathed a property for life and the widow on giving up her possession of some part of the property in favour of another heir and retaining a limited part for herself under a compromise, would become absolute owner of the part retained by her under such compromise on the Act coming into force.⁴ A

98 *Sukh Ram v Gauri Shankar* AIR 1968 SC 365; *Sonekali v Bahuria Akashi Devi* AIR 1973 AP 477.

99 *Saila Bala Dasi v Saila Bala* AIR 1961 Cal 26; *Ram Chander v Ganesh Das* AIR 1984 SC 42.

1 *Chinti v Daultu* AIR 1968 Del 264 (FB).

2 AIR 1991 SC 1581.

3 *Kalawatibai v Soiryabai* AIR 1991 SC 1581, in view of this case, the decision in *Kanchan v Tarini* AIR 1992 Ori 159 is no longer good law, since it relied upon the Delhi (FB) case which was overruled by the Supreme Court; *Gulabrao Balwantrao Shinde v Chhabubai Shinde* AIR 2003 SC 160 (overruling *Chhabubai Shinde v Balwantroa Shinde* AIR 2001 Bom 486).

4 *Mahesh Sharma v Raj Kumari* AIR 1996 SC 869 (see the decisions cited therein).

property bequeathed absolutely to the wife by the husband under a will, the will also leaving it to the discretion of the wife to adopt a child and also stating that such son, if adopted would become owner of the property after the mother's death, the widow's ownership of such property was absolute and the adopted son only had rights in the property remaining with the estate on the death of the mother, since she was an absolute owner.⁵

The section, however, is not intended to validate illegal possession of a female Hindu and does not confer any right on a trespasser⁶ or on a female who had no right to hold or possess the property.⁷ The female owner must be in possession of the property. If she had already divested her interest as a limited owner⁸ or had been divested of her interest as a widow on account of remarriage before the Act came into force she would not become full owner of the property, simply because she had not been deprived of the possession of the property when the Act came into force.⁹ She would not, however, forfeit her right to the property if she remarried after this Act came into operation and the property vested in her as full owner.¹⁰ Nor would she forfeit her right in circumstances mentioned in *Jagannathan's* case referred to above.

This section can have no application where a female Hindu never acquired any property at all or where having acquired it she happened to have lost her title thereto by alienation, surrender or otherwise and of which she was not or could not be in juridical possession at the commencement of the Act,¹¹ unless she subsequently acquired property and possession as, for

5 *Brahma Vart Sanatan Dharam Mandal v Kanbaiyalal Bagla* AIR 2001 SC 3799.

6 *Bakhtawari v Sadhu Singh* AIR 1959 Punj 558; *Gurdas v Prito* AIR 1961 Punj 203.

7 *Giono v Moti Ram* AIR 1961 Punj 274; *Andal Ammal v Sivaprakasa* AIR 1963 Mad 452; *Ram Rakhi v Ammar Nath* AIR 1983 P&H 156 (mere residence in a family house without apportionment of any particular portion of the house, may not, in the facts and circumstances of the case, invite operation of sub-s (1)).

8 *Chandradip Rai v Mahip Rai* AIR 1960 AP 112; *Sumer Chand v Ramakrishnan* AIR 1991 Punj 103.

9 *Velamuri Venkata Shivaprasad v Kothuri Venkateswarlu* AIR 2000 SC 434 (also see notes under remarriage infra); *Bisarti v Sukarti* AIR 1960 MP 156; *Sankar Prasad v Ushabala* AIR 1978 Cal 525.

10 *Pandurang v Sindhu* AIR 1971 Bom 413; *Chimappa v Meenakshi* AIR 1971 Mad 453; *Annapurna v Kalpana Debi* AIR 1972 Gau 107; *Bhuri Bai v Champa Bai* AIR 1968 Raj 139; *Khageshwar v Domuni* AIR 1989 Ori 10; *Gajodhara Devi v Gokul* AIR 1990 SC 46.

11 *Eramma v Veeruppana* AIR 1966 SC 1879; *Mohari v Chukli* AIR 1960 Raj 82; *Pathumma Beebi v Krishna Asari* AIR 1961 Ker 247; *Vishwapathi v Venkata Krishna* AIR 1963 AP 9; *Ram Ghulam Singh v Palakdhari Singh* AIR 1961 AP 60; *Gangadhar Charan v Saraswati* AIR 1962 Ori 190; *Bapurao v Neroji* AIR 1961 Bom 300; *Damodhar Rao v Bhima Rao* AIR 1965 Mys 290; *Mukhtiar Kaur v Kartar Kaur* AIR 1960 Punj 31; *Nathuni Prasad v Kachnar* AIR 1965 AP 160 (wrongful alienation by widow); *Chandrarath v Chandrarath* AIR 1992 Kant 153 (widow selling off property—purchaser allowing widow right of residence for lifetime—such widow does not become full owner—she cannot alienate such property).

instance, in the case of *Jagannathan* referred to above. It has been held in a series of cases that the section can have no application in a case where a female Hindu has sold or otherwise alienated the property and parted with possession before the Act came into force.¹² The sale of property by a widow who had a limited interest in the same before the commencement of this Act, will not confer any advantage on the purchaser as the sale itself was invalid. The property would vest in the reversioners of the widow after her lifetime.¹³ As explained by the Supreme Court, in order that the female Hindu can be said to be 'possessed' of the property two things are necessary: (a) she must have had a right to the possession of the property; and (b) she must have been in possession of that property either actually or constructively. It necessarily follows that if her possession was that of a trespasser when the Act came into force and then thereafter till her death she cannot be said to have acquired any right under this section. In that case, *G* died in 1920 and on his death, his widow *L* took possession of his property as his heir. In 1936, she gifted the property to *N* and on the death of *N* the plaintiffs came into possession of the same. In 1951, *L* took wrongful possession of the property. In a suit by the plaintiffs it was held that *L* could not be said to be 'possessed' of the property when the Act came into force because she had no right to be in possession of the property and she did not acquire any right under the section.¹⁴ The position, however, would be different in case of property acquired by a female Hindu by prescription.¹⁵ When the properties in question were ancestral, and there were other persons entitled to inherit, the absence of material to show settlement of such properties on a widow, in recognition of her right of maintenance, would make this section inapplicable and such widow could not claim full ownership.¹⁶ The legal position has been discussed and explained in the decisions of the Supreme Court to which reference has already been made above.

REVERSIONERS

It is true that a reversion gets abolished as a consequence of the woman's estate being enlarged to full ownership where the limited owner 'possessed' the property. In respect, however, of property other than property to which this section applies by reason of its being 'possessed' by her, the position

12 *Marudakkal v Arumugha* AIR 1958 Mad 255; *Venkayamma v Veerayya* AIR 1957 AP 280; *Amar Singh v Sewa Ram* AIR 1960 Punj 530; *Kanthimathinatha v Vayyapuri* AIR 1963 Mad 37; *Sheopujan v Ramsevak* AIR 1963 AP 330; *Sansir Patelin v Satyabati* AIR 1958 Ori 75; *Anath Bandhu v Chanchala Bala* AIR 1976 Cal 303.

13 *Nallan v Vellaiyankudumban* AIR 2001 Mad 6.

14 *Dindyal v Rajaram* AIR 1970 SC 1019.

15 *Harmal Kaur v Kartar Kaur* AIR 1968 P&H 295.

16 *Gulabrao Balwantrao Shinde v Chhabubai Shinde* AIR 2003 SC 160.

is different. As already pointed out, the section has no application where a Hindu female having acquired property as a limited owner happens to have lost her title thereto by alienation, surrender or otherwise and of which she was not or could not be in juridical possession at the commencement of the Act. The right of a reversioner to repudiate the alienation made without legal necessity or other transaction in any such case, effected before the Act came into operation and his claim to possession thereof from the transferee on the death of the female Hindu, or on the extinction of the limited estate otherwise has not been adversely affected or taken away by this section.¹⁷ Reference may also be made to the decision of the Supreme Court in *Kotturuswami v Veerava* and other decisions on the subject to which reference has already been made. The question of maintainability of such a suit was again examined by the Supreme Court and the same view was taken.¹⁸ The reversioner need not challenge the alienation, which is a nullity in itself, within the period of limitation.¹⁹ This section or s 15 does not affect the maintainability of a suit by a reversioner in any such case.²⁰

There was a difference of opinion among various High Courts as to who would be the reversioners entitled to challenge for any alienation of the nature mentioned above and made before the Act came into operation till the decision of the Supreme Court in *Daya Singh v Dhan Kaur*.²¹ The Supreme Court held that the reversioners entitled to maintain the suit in case of any such alienation by a widow would be those who would be the heirs of the husband at the time of the death of the widow according to the law in force at such date and not those who would have been heirs of the husband according to the law in force at the time of his death. The heirs would be ascertained by applying s 8 of the Act as if the husband had died at the time of the widow's death.

In a case decided by the High Court of Mysore,²² the last male holder died in 1918 and the widow who inherited his property died in 1958 after the Act came into force. The widow having parted with possession of the

17 *Harak Singh v Kailash Singh* AIR 1958 AP 581 (FB), *Amar Singh v Sewa Ram* AIR 1960 Punj 530 (FB) (gift by widow); *Nathuni Missir v Ratna Kuer* AIR 1963 AP 337 (surrender); *Tulsi Abir v Sonia* AIR 1962 AP 296; *Marudakkal v Arumugha* AIR 1958 Mad 255, ILR (1958) Mad 354, (1958) 1 Mad LJ 101; *Kanthimathinatha v Vayyapuri* AIR 1963 Mad 37; *Somiah v Rattamma* AIR 1959 AP 244; *Bhagirathi Khan v Nanibahu* 1979 CWN 87.

18 *Radha Rani v Hanuman Prasad* AIR 1966 SC 216; *Radhey Krishan v Shri Shankara* AIR 1973 SC 2405.

19 *Nallan v Vellaliyankudumban* AIR 2001 Mad 6.

20 *Janku v Kisan* AIR 1959 MP 1; *Bakurao v Neroji* AIR 1961 Bom 300; *Mangla Balmukund v Nathiya* AIR 1971 P&H 365.

21 AIR 1974 SC 665, *Kumaraswami v DR Nanjappa* AIR 1978 Mad 285 (FB), *Simer Chand v Ramkrishnan* AIR 1991 Punj 103 (widow not in possession of property on commencement of Act, not full owner—subsequent gift and sale invalid).

22 *Kempiah v Girigamma* AIR 1966 Mys 189.

property in favour of a donee before she could have become owner of the property by operation of this section, the question arose as to who would be the reversioners entitled to challenge for the alienation by the widow beyond her lifetime. It was held that the reversioners were to be ascertained according to the Hindu law operative at the time of the death of the last male holder and not at the date when the widow died in 1958. A similar view had been taken by the High Court of Orissa²³ and Patna.²⁴ A contrary view had been taken in the undermentioned decisions of the High Court of Punjab,²⁵ according to which in any such case the succession would open on the death of the widow and the reversioners would be those who would have been the heirs of the last male holder if he had died in 1958, that is, by reference to s 8 of this Act. In the latest decision of the High Court of Mysore, however, the view had been expressed that the question fails to be settled as of the date when succession opens, that is on the death of the female life estate holder.²⁶ The High Courts of Andhra Pradesh,²⁷ Himachal Pradesh,²⁸ and Calcutta²⁹ took the same view. The controversy is now resolved by the decision of the Supreme Court mentioned above. Reference may also be made to the notes under 'possessed by a female Hindu...of this Act'.

SUIT BY REMOTE REVERSIONER

A question may arise as to the maintainability of a suit by a remote reversioner and as to whether such suit would fail to the advantage of the alienee on the ground of the challenge not having been brought by the next reversioner. As can be seen from the decision of the Supreme Court in *Daya Singh's* case, the reversioners entitled to maintain any such proceedings would be the heirs of the husband on the death of the widow according to the prevalent law at the time of the widow's death. Taking this decision into consideration, the High Court of Madhya Pradesh has taken the view that it is only the nearest reversioner who can challenge the alienation by the widow and in the absence of a challenge by the next reversioner, the alienee cannot be dispossessed by the remote reversioner.³⁰ In a subsequent

23 *Jandehi v Upendra* AIR 1968 Ori 187; *Judhistir Sahu v Sesha Patro* AIR 1984 Ori 142.

24 *Chaturbhuj v Sarbeshwar* AIR 1967 AP 138.

25 *Kuldip Singh v Karnail Singh* AIR 1961 Punj 573; *Banso v Charan Singh* AIR 1961 Punj 45; *Gurmit Singh v Tara Singh* AIR 1960 Punj 6; *Taro v Darshan Singh* AIR 1960 Punj 145; *Harbhaj v Mohar Singh* AIR 1967 Punj 184.

26 *Satyanarayana v Seethamma* AIR 1972 Mys 247; *Ramchandra v Srideviamma* AIR 1974 Kant 68 (FB), AIR 1976 Kant 217.

27 *Ramulu v Narayana* AIR 1965 AP 466.

28 *Lachhman v Thunia* AIR 1972 HP 69 (FB).

29 *Bepin Behary v Lakshasona* AIR 1959 Cal 27; *Hira Lal v Kumud Behari* AIR 1957 Cal 571.

30 *Anjanbai v Ramprasad* AIR 1994 MP 91.

decision, however, the Supreme Court has expressed the view that the alienee cannot object to the proceedings on the ground of the challenge not being by the next reversioner who was alive and that a suit even by a remote reversioner was also maintainable.³¹ The reasoning adopted by the court seems to be that the challenge by the remote reversioner could be for the benefit of the next reversioner. It appears that the reasoning of the court stems from the fact that even if the alienation is challenged by a remote reversioner, it is not only that reversioner who would stand to benefit on such an alienation being set aside but, since 'the effect of the challenge succeeding would be that the property in question would revert to the estate of the deceased, the next reversioner would also reap the benefits of the division which would then take place posterior to the setting aside of the alienation, as the property would then be divided amongst the heirs of the limited owner in accordance with the rules of succession and the entitlement of shares to various heirs as stipulated by this Act. One aspect that is however to be taken note of in the above decision is that in that case, the Supreme Court was dealing with alienation by a male and not by a female heir who has a limited right over the estate. The court seems to have equated a 'remote heir' with a 'remote reversioner' in the case before it, the effect of the decision being the abrogation of the distinction existing between the two classes.

SECTIONS 8 AND 14

Question sometimes arises as to who would be the heirs of a female who had become full owner by operation of the present section. It would seem clear that her heirs would be those mentioned in s 15 *post*. Reference may be made to notes under that section. Reference may also be made to the decision of the Supreme Court in *Daya Singh v Dhan Kaur* *supra*, and notes under 'Reversioners' above.

SURRENDER OF ESTATE BY WIDOW OR OTHER LIMITED HEIR

Where a valid surrender of her estate was made by a widow or other limited heir in favour of a female reversioner it did not, under the previous law, confer on the female reversioner any larger estate but merely accelerated the estate of such reversioner. The estate vested in her as a limited owner and on her death it passed to the next reversioner and did not revert to the widow or other limited heir who had by surrender completely effaced herself (§ 197, Vol I). Any such case of the female reversioner in whose

³¹ *Bakshi Ram v Brij Lal* AIR 1996 SC 395 (attention is drawn to the distinction with other cases cited therein)

favour the surrender was made would invite the operation of the rule laid down in this section and her interest in property possessed by her at the commencement of the Act would be treated as enlarged into full ownership.

RECONVEYANCE TO THE LIMITED OWNER BY THE ALIENEE OF PROPERTY, ALIENATED BY HER BEFORE THE ACT CAME INTO FORCE

A rather unusual situation arises where an alienee from a limited owner, for instance a widow, reconveys the property to the widow in consequence of a challenge by the reversioners or after the reversioners obtain a decree declaring that the alienation would not bind the reversioners after the death of the widow. The view has been taken in the undermentioned cases,³² that the widow would become an absolute owner of the property by operation of this section even though the reconveyance might have taken place after this Act came into operation. A similar view has also been taken in other decisions in a somewhat similar situation.³³ Reference may be made also to the undermentioned decisions of the Supreme Court.³⁴

‘...AS FULL OWNER...’

The expression ‘full owner’ has been used in the sense of absolute ownership and in contradistinction to the term ‘limited owner’, which had received special significance under the old law. The impossibility of exactly defining or circumscribing the right of absolute ownership, it is well understood, arises from various difficulties. The expression ‘full ownership’ is used in this section in the context of property and denotes a right indefinite in point of user, unrestricted in point of disposition, unlimited in point of duration and heritable as such a right by the heirs of the owner. In any such case covered by this section the disposition of such property by the female Hindu by a will, executed by her after or even before she became full owner, will be valid and operative since in either case the will can speak from the date of her death, that is after she became full owner of the property.³⁵ The ambit of this right cannot be cut down by any text rule or interpretation of Hindu law. Therefore, the right of disposition of any such property by the

32 *Jagat Singh v Teja Singh* AIR 1970 P&H 309 (FB); *Chinnakolandi v Thanji* AIR 1965 Mad 497; contra *Ganesh Mahanta v Sukriya Bewa* AIR 1963 Ori 167; *Hari Ram v Harbans Singh* AIR 1973 HP 71.

33 *Jagannathan v Kunjithapatham* AIR 1972 Mad 390; *Champa v Chandrakanta* AIR 1973 Guj 227 (alienor agreed to treat sale as cancelled by parting with possession in her favour); *Bhagwan v Vishwanath* AIR 1979 Bom 1.

34 *Jagannathan Pillai v Kunjithapadam Pillai* AIR 1987 SC 1493.

35 *Ladhi Bai v Thakur Singh* AIR 1968 Punj 41; *Sunderdevi v Manakchand* AIR 1975 Raj 211 (will executed before 1956); *Shiv Dass v Devki* AIR 1978 P&H 285.

female Hindu will not be affected or controlled by an adoption by her after the Act came into operation.³⁶ Nor can the ambit of this right be cut down in case of adoption by a widow of a son after she became full owner by operation of this sub-s simply on the ground that it was joint family property before the commencement of the Act. The adoptee would not acquire any interest in the property if it had ceased to be joint family property at the date of adoption.³⁷

REMARRIAGE

Once a widow succeeds to the property of her husband and acquires absolute right over the same under this section, she would not be divested of that absolute right on her remarriage and s 2 of the Hindu Widows Remarriage Act 1856 will not be attracted on account of the overriding effect given to the provisions of this Act under s 4.³⁸ This is subject to the qualification, that the remarriage was *post* 1956, ie, after the coming into force of this Act. A constricted or limited entitlement of maintenance would necessarily fructify into a full estate for a widow, provided she had not remarried before the Act came into force. This act is prospective in operation, and in the event of a divestation prior to 1956, the question of applicability of s 14(1) would not arise, since, if the widow had remarried before the Act came into force, she would be disentitled to inherit the property of her deceased husband. There being a pre-divestation by the widow, no rights would accrue to her. The Hindu Widows Remarriage Act was operational before 1956, and the Hindu Succession Act could not confer on the widow, rights that she did not have in terms of s 14(1) by virtue of her marriage prior to the coming into force of this Act.³⁹

Transferee from female Hindu after 1956.—Where the undivided interest of a female Hindu (under Hindu Women's Rights to Property Act 1937) had become full ownership under this section, a transferee (donee) of such interest from her acquires a right to joint possession with the other persons (coparceners). Any of the parties can have partition of the property if he chooses to do so.⁴⁰

³⁶ *Punithavelli Ammal v Ramalingam* AIR 1970 SC 1730; *Kishan v Hari* AIR 1974 Bom 65; *Yamunbai v Ram Maharaj* AIR 1960 Bom 463.

³⁷ *Kesharbai v State of Maharashtra* AIR 1981 Bom 115 (FB); also see Illust 4 and see under s 12 Hindu Adoption and Maintenance Act; *Chandram Bai v Pradeepkumar* AIR 1991 MP 286 (adopted son not to get right of co-ownership by virtue of adoption).

³⁸ *Jagdish Mahlon v Mohammad Elahi* AIR 1973 Pat 170; *Sasank Bhaumik v Aniya Bhowmik* 1978 CWN 1011; *Sulochana Dei v Khali Dei* AIR 1987 Ori 11.

³⁹ *Velamuri Venkata Shivarasad v Kotburi Vankateswarlu* AIR 2000 SC 131 (Case law discussed).

⁴⁰ *Sri Krishna Dass v Phool Kumari* AIR 1973 All 439

EXPLANATION

The Explanation is too plain to need any comment. It deals elaborately with the various sources and the sundry modes or manners of acquisition of property by a female Hindu and ends up with the words 'in any other manner whatsoever' and also refers to property held as *stridhana*. It may suffer from excessive caution but the object of the legislature obviously was to define the term 'property' as comprehensively as possible. In *Munnalal v Rajkumar*,⁴¹ the Supreme Court pointed out that this Explanation gives the expression 'property' the widest connotation.

Case of property acquired by a widow on partition with a co-widow would fall under the *Explanation*.⁴²

SUB-SECTION (2): RESTRICTED ESTATE

The object of this sub-section is to confine the language of sub-s (1) to its own subject and to stress its co-existence with sets of provisions in other enactments such as the Transfer of Property Act and the Indian Succession Act which may be applicable to Hindus. The object of this sub-section is also to make it abundantly clear that a restricted estate can even after the commencement of the Act come into existence in case of interest in property given to a female Hindu, by operation of transactions *inter vivos*, by testamentary disposition, by decree or order of a civil court or under an award. It is also intended to make it clear that any such restricted estate created prior to the commencement of the Act will not be enlarged into full ownership by operation of sub-s (1) if the gift, will, other instrument, decree, order or award had prescribed a restricted estate. Also see notes on *restricted estate*, *infra*.

As already pointed out, the more recent decisions of the Supreme Court have given 'a most expansive interpretation' to the general rule enacted in sub-s (1). It has been held by the Supreme Court that this sub-s (2) must be read only as a proviso or exception to sub-s (1) and its operation must be confined to cases where property is acquired for the first time as a grant without any pre-existing right under a gift, will, instrument, decree, order or award, the terms of which prescribed a restricted estate in the property.⁴³ Where, however, property is acquired by a female Hindu at a partition or in lieu of maintenance, it is in lieu of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-s (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property.

41 (1962) SC 1493, *Ramchandra v Savitribai* AIR 1978 Bom 212.

42 *Chellammal v Valliammal* AIR 1978 Mad 21.

43 *Tulasamma v Shesha Reddi* AIR 1977 SC 1944; *Champa Devi v Madho Sharan Singh* AIR 1981 Pat 103; *A Venkataraman v S Rajalakshmi* AIR 1985 Mad 248.

In *Badri Pershad v Kanso Devi*,⁴⁴ the Supreme Court pointed out that it would depend on the facts of each case whether the same is covered by the first or the second sub-section. It was observed that sub-s (2) is more in the nature of a proviso or an exception to sub-s (1).

It was also observed that sub-s (2) can come into operation only if acquisition in any of the methods indicated in it is made for the first time without there being any pre-existing right to the female Hindu who is in possession of the property. The court also expressed agreement with the view that the object of the section was to remove the disability on women imposed by law and not to interfere with contracts, grants or decrees etc, by virtue of which a woman's right was restricted.

In *Tulasamma's* case referred to above, Bhagwati J observed:

[B]eing in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of women in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). It cannot be interpreted in a manner, which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1).

‘...ACQUIRED BY WAY OF...’

The expression ‘acquired’ means that the female Hindu did not have any interest in the property prior to its acquisition by her.⁴⁵ The operation of the sub-section is confined to property acquired by a female Hindu in any manner stated in it and does not cover the case of a decree or any other instrument which merely declares her right in the property in question when the title itself in the property was not really in dispute. Thus, for instance, if the female Hindu had prior to the date of the decree, title to the property and the decree declared that title, she cannot be said to have acquired the property under that decree.⁴⁶ In order to invoke the application of this sub-section it is necessary to satisfy the essential condition that the instrument which limits or restricts the estate should itself be the source or foundation of the female's title to the property. If she had an existing interest in the property, the interposition of any instrument will not affect the operation of sub-s (1). The instrument, for instance, may be an award

⁴⁴ AIR 1970 SC 1963.

⁴⁵ *Sampathkumari v Lakshmi Ammal* AIR 1963 Mad 50, *Subbarreddy v Cenchalamma* AIR 1962 AP 368; *Revabai v Sitaram* AIR 1984 AP 102 (partition between co-widows—exclusive possession given by decree).

⁴⁶ *Satsulbar v Tara Sandani* AIR 1962 Cal 438, *Janak Daulani v Dist Judge Kamptul* AIR 1961 All 294.

or a decree or an order or a deed of partition but if the pre-existing right was there, sub-s (2) cannot have the effect of taking the property out of the coverage of sub-s (1). In any such case the mere fact that the instrument provides that the female Hindu is to have a limited estate or there is a restriction on her power of alienation or that the property will on her death revert to the next reversioner will not take the case out of the purview of sub-s (1). Such terms are merely reiteration of the incidents of Hindu law applicable to limited estate.⁴⁷ In the Supreme Court case of *Badri Pershad v Kanso Devi* as referred to above, one *G* died in 1947 leaving surviving him four sons by his predeceased wife and one son by his second wife *K* who also survived him. *G* left considerable self-acquired property. Some difference arose between these heirs in respect of partitioning of the property among them and the arbitrator who was appointed made his award, which was made an order of the court. The award stated that *K* would have a widow's estate in the share allotted to her. It was held that she had acquired an interest in the property left by *G* by virtue of the Hindu Women's Right to Property Act 1937, and became absolute owner of the property allotted to her as the case was covered by sub-s (1) and the Explanation to it and sub-s (2) was not attracted simply because there was a partition and an award. On the same principle, for instance in case of two female Hindus who inherited property from their husband and then divided the same between them by an instrument of partition, it cannot be said that they acquired their property under such instrument. The partition merely caused adjustment of the proprietary right which had already arisen. In the context of the present section they must be said to have acquired their interest in the property as heirs of the husband and not under the instrument.⁴⁸

The question in these cases will be mostly one of construction of the instrument and ascertainment of the intention therein expressed. As pointed out by the Supreme Court it will depend on the facts of each case whether the same is covered by the first sub-section or sub-s (2). The facts have to be examined in the light of the principles stated above. Thus for instance it has been held that where there is a dispute about property between rival claimants and it is settled by a compromise, the title of the female Hindu flows from the compromise since each party gives up its respective claim and accepts the compromise as the basis of its title.⁴⁹ Where there were bona fide disputes as to the title itself and in a compromise decree passed in 1924 between an adopted son and his widow mothers, the son got half share in the property in dispute and the widows got the remaining half

⁴⁷ *Gurunath Chetty v Naraneethamma* AIR 1967 Mad 429; *Pattabiraman v Parijatham Ammal* AIR 1970 Mad 257; *Kaliammal v Andiammal* AIR 1965 Mad 451; *Bapusaheb v Gangabai* AIR 1972 Bom 16.

⁴⁸ *Sampath Kumari v Lakshmiammal* AIR 1963 Mad 50.

⁴⁹ *Kirpo v Bakhtawar Singh* AIR 1964 Punj 474.

share with certain other stipulations, it was held that only a restricted right was given to the widows and the case fell under the present sub-section.⁵⁰

A restricted estate may be created by a will or a deed of settlement.⁵¹ *J* executed a will whereby he directed that on his death his entire estate will devolve on his widow *N* during her lifetime and thereafter it would devolve on *B* and *A* who were his collaterals. It was held that the life estate given to her under the will did not become an absolute estate and the case would be covered by sub-s (2).⁵² When under a will, a husband was given a limited right to enjoy it during his life time but without any right of alienation of the same, such will further stating that if a son was born to him the son would become the full owner of the property. When the husband died issueless his widow would not succeed to his property by virtue of a right of maintenance. This is because the will under which the husband had been given the property prescribed a restricted estate and the widow by necessary implication would not become the absolute owner of the property. The sale of such suit property by the widow on the basis that she had become the full owner was invalid and liable to be set aside.⁵³

In a case decided by the High Court of Madras,⁵⁴ a testator gave a life estate to his wife *A* and after her death her daughter *V* and brother *B* were to take over the estate as absolute owners in equal moiety; but in the event of the death of *V* without any male issue the entire property was to devolve absolutely on *B*. Subsequently, there was a compromise and under one of the terms of the compromise a life estate was conferred on *A* without power of alienation. It was held that the case did not fall under sub-s (2) and *A* became an absolute owner of the property.

When a will prescribed a right to enjoyment of the property without a right of alienation, further prescribing that the property would vest in the son after the death of the wife, the widow would be a limited owner, such ownership will not ripen into a full estate.⁵⁵

50 *Mali Bewa v Dodhi Das* AIR 1960 Ori 81; *Seetharamayya v Peraiyah* AIR 1964 AP 545.

51 *Jagir Singh v Baboo Singh* AIR 1982 P&H 202 (to married daughter—limited estate); *Kashiram v Bhurelal & ors* AIR 1981 MP 236 (will in favour of daughter—*sir* lands and house—on facts and circumstances held that only life interest was given).

52 *Karni v Amru* AIR 1971 SC 745; *Appaswami v Sarangapam* AIR 1978 SC 1051; *Achutrao v Union of India* (1977) 1 Andh LJ 337 (life-estate under will of father-in-law); *Jaswant Kaur v Harpal Singh* 1979 PLR 523; *Satyanarayana v G. Subbarayya* AIR 1987 SC 354; *Pritam Singh v Bachan Kaur* AIR 1985 P&H 4 (FB); *Rajagopal Chettiar v Mamasavani Ammal* AIR 1992 SC 704 (contention reapplicability of s 14(1) not allowed before Supreme Court); *Bhura v Kashiram* AIR 1994 SC 1202 (on construction of the will, held, only, life interest conferred); *Gorachand Mukherjee v Malabika Dutta* AIR 2002 Cal 26 (only lifetime interest given, cannot become full owner)

53 *Munimajappa v R Manual* AIR 2001 SC 1754.

54 *Venugopala Pillai v T Ammal* AIR 1979 Mad 124.

55 *Anoop Kaur v Anup Singh* AIR 2003 P&H 241.

A deed of partition between members of a joint Hindu family would not ordinarily fall under the description of 'any other instrument' prescribing a 'restricted estate' within the meaning of this sub-section because no fresh title is created by a partition deed among the members of a joint Hindu family.⁵⁶ As a general rule a partition deed of this nature declares the existing rights of the parties and even when it declares and allots a share in favour of a female Hindu member of the family and defines the property allotted to her it does not of itself become the source or foundation of the female's title to such property. The instrument only crystallises, declares or recognises her pre-existing rights and the case does not come under the coverage of this sub-section. On the other hand, a partition deed may go beyond this and in fact record a bona fide compromise of disputed claims between the female member and the other members. It may also embody a bona fide family settlement or family arrangement and if on a proper interpretation of the instrument the court comes to the conclusion that the intention of the parties was to create a 'restricted estate' of the nature visualised by this sub-section the case would fall within its purview, regard being had to the principles discussed above.⁵⁷

PROPERTY GIVEN IN LIEU OF MAINTENANCE

When specific property is allotted to a widow in lieu of her claim for maintenance under an instrument which prescribes a restricted estate, question has arisen as to whether she becomes absolute owner of the same by operation of sub-s (1) read with the Explanation or does she remain entitled only to a restricted estate as visualised in sub-s (2). There was no difficulty as to the effect of any instrument giving specified property for maintenance to a Hindu widow where the instrument was executed after the death of her husband after the Hindu Women's Right to Property Act 1937 came into operation; because in any such case the subsequent instrument could be regarded as merely declaring the pre-existing title in the widow. And although the instrument spoke of limited interest the case did fall under sub-s (1) read with the Explanation. Difficulty, however, arose where the husband had died before the Act of 1937 came into operation and there was considerable diversity of judicial opinion on the subject. The question is now settled by decisions of the Supreme Court and it has been held that a most

56 *Jagannathpuri v Godebai* AIR 1968 Bom 25; *Udbay Shankar v Tarabai* AIR 1968 Bom 308; *Purna Chandra v Nimei Charan* AIR 1968 Ori 196; *Chellammal v Walliammal* AIR 1978 Mad 21.

57 *Jaria Devi v Shyam Sunder* [1959] AC 338; *Lalji Maitra v Shyam Behari* AIR 1979 All 379 (new rights created); *Ram Sarup v Toti* AIR 1973 P&H 329; *Kirpo v Bakhtawar Singh* AIR 1964 Punj 474. However, every family arrangement or settlement need not fall under sub-s (2); *Lachhia v Ram Shankar* AIR 1966 AP 191 (nor need every compromise); *Ude Chand v Rajo* AIR 1966 Punj 329; *Mahadeo v Bensraji* AIR 1971 AP 515; *Raghunath v Bhimsen* AIR 1965 Ori 59.

expansive interpretation has to be given to sub-s (1) and the operation of sub-s (2) must be confined to cases where property is acquired for the first time as a grant without any pre-existing right under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. However, where property is acquired by a Hindu female in lieu of right of maintenance, it is by virtue of a pre-existing right that such an acquisition would not, within the ambit of sub-s (2) even if the instrument, decree or award allotting the property, be prescribed a restricted estate in the property.⁵⁸ In *Tulasamma v Sesha Reddi*, the Supreme Court overruled its earlier decision on the subject⁵⁹ and settled the legal position as above. In a still later decision, *Vijia v Thakorbbhai*,⁶⁰ the Supreme Court examined the incidents of limited ownership and reiterated the view expressed by it in *Tulasamma's* case. In *Gulwant Kaur v Mohinder Singh*,⁶¹ the Supreme Court emphasised that the section is aimed at removing restrictions or limitations on the rights of a female Hindu to enjoy as a full owner the property possessed by her so long as her possession is traceable to the lawful origin, that is to say, she has a vestige of title. The undermentioned decisions of various High Courts have been overruled by the Supreme Court.⁶² In the undermentioned decisions, the view has been taken that the

58 *Tulasamma v Sesha Reddi* AIR 1977 SC 1944; *State of Uttar Pradesh v Nand Kishore* AIR 1977 SC 1267; *Santhanam v Subramanya* AIR 1977 SC 2024; *Vajia v Thakorbbhai* AIR 1979 SC 993; *Sellammal v Nellammal* AIR 1977 SC 1265; *Krishna Das v Venkayya* AIR 1978 SC 361; *Padma Vati v Dasaundhi Ram* AIR 1986 P&H 155; *Bajinath Kaur v Maheshwari Devi* AIR 1981 Pat 255; *Tirath v Manmohan Singh* AIR 1981 P&H 174; *Champa Devi v Madho Saran Singh* AIR 1981 Pat 103; *Adinarayana v Ramabari* AIR 1980 Ori 95; *Janki v Gorinda* AIR 1980 Ker 218 (case did not fall under s 14 at all); *Ram Sarup v Patto* AIR 1981 P&H 68 (property given to destitute widow daughter for maintenance). *Namodevi v Rattan Chand* AIR 1990 HP 47; *Kota Varaprasad Rao v Kota China Venkiah* AIR 1992 AP 1; *Bhola Ram v Madanlal* AIR 2000 P&H 55; *P Rameswara Rao v I Sanjeeva Rao* AIR 2004 AP 117 (property given by father-in-law for maintenance, distinguishing *Satyanarayana v Sithayaya* AIR 1987 SC 353).

59 AIR 1976 SC 2198

60 AIR 1979 SC 993.

61 AIR 1987 SC 2251; *Goyal Singh v Dile Ram* AIR 1987 SC 2394 (will by widow in respect of properties subsequent to coming into force of the Act although in earlier decision gift by her of same was found ineffective by virtue of previous law).

62 *Santhanam v Subramania* (1967) ILR 1 Mad 68; *Kachapalava Gurukul v Subramania Gurukul* AIR 1972 Mad 279; *Shiv Ratan Rai v Jamuna Misir* (1968) ILR 47 Pat 1118; *Gopisetty v Subarayudu* (1968) ILR AP 621; *Ram Jog v Director of Consolidation* AIR 1975 All 151; *Ajab Singh v Ram Singh* AIR 1959 J&K 92 (FB). Some other High Court decisions on the same line which must be regarded as overruled are: *Kusumgowri v Umaben* AIR 1975 Guj 126; *Subba Naidu v Rajammal* AIR 1977 Mad 64; *Pattabhiraman v Parjatham Ammal* AIR 1970 Mad 257; *Gaurinadhan v Naraneethamma* AIR 1967 Mad 429; *Thayammal v Salammal* AIR 1972 Mad 83; *Kempanna v Shantarajiah* AIR 1973 Mys 66; *Chanamma v Lingamma* AIR 1972 Mys 333; *Narayan v Tara* AIR 1970 Ori 131; *Lakshmi Chand v Sukhdevi* AIR 1970 Raj 285; *Bindroo v Munshi* AIR 1971 J&K 142.

case would fall under sub-s (1) read with the Explanation,⁶³ and the widow was held to have become the absolute owner. As held by the Supreme Court in *Tulasamma's* case supra, and its subsequent pronouncement in *Raghuvar Singh v Gulab Singh*,⁶⁴ the pre-existing right of maintenance of the widow would transcend into an absolute right, and sub-s (2) would not have any application in such cases of pre-existing rights.⁶⁵ A bequest of property to a wife in lieu of maintenance with a further bequest of distribution of the property amongst the daughters after the lifetime of the wife, would make the wife an absolute owner of the property.⁶⁶

Since a widow is held to be an absolute owner of property received in lieu of maintenance, any gift made by her from the property is valid.⁶⁷ When a provision is made for a widow in lieu of maintenance, such maintenance would necessarily include provision for residence by settling a lumpsum on the widow or by making provision of a property for the

63 *Bapusabeh v Gangabai* AIR 1972 Bom 16; *Gadam v Venkatarajalu* AIR 1965 AP 66; *Someshwar v Swami Nath* AIR 1970 AP 348 (in such a case, though the female Hindu cannot be said to be limited owner of the property still the inclusive definition of the word property in the Explanation according to this decision, makes her a limited owner for the purpose of sub-s (1)); *Sharbati Devi v Hiralal* AIR 1964 Punj 114; *Subagwanti v Sodhan* AIR 1968 Punj 24; *Ram Jag v Director of Consolidation* AIR 1968 All 419; *Bhushan Lal v Suresh Kumar* AIR 1987 All 25; *Bindbashini v Sheorati* AIR 1971 AP 104; *Sheoji v Prema Kuer* AIR 1964 AP 187; *Hanamangouda v Hanamangouda* AIR 1972 Mys 286; *Kunji Thomman v Meenakshi* AIR 1970 Ker 284; *Saraswathi Ammal v Anantha* AIR 1966 Ker 66; *Chanamma v Lingamma* AIR 1972 Mys 333; *Limba v Manikrao* AIR 1978 Bom 83; *Muthu Battar v Chokku Battar* AIR 1976 Mah 8; *Lakshmi Devi v Shankar Jha* AIR 1974 Pat 87; *Nand Singh v Nachbatar Singh* AIR 1975 P&H 45; *Nanak Singh v Chhindo* AIR 1974 P&H 220; *Goumati v Shankar Lab* AIR 1974 Raj 147; *Sarat Lakshmi Deb v Sisir Kumar Deb* 1978 CWN 357; *Hari Dutt v Shiv Ram* AIR 1979 HP 41 (gift for maintenance by father-in-law: compromise); *Sri Ram v Hukmi* AIR 1977 HP 46; *Mool Kanwar v Jeewalal* AIR 1982 Raj 267 (widow in possession of property given to her for residence—presumption raised); *Ginnappa v Kallanna* AIR 1983 Kant 67 (acquisition of property by female by virtue of pre-existing right—gift to daughter in 1968—daughter's right covered by sub-s (1) and (2) not applicable); *Dharamwati Bai v Shiv Singh* AIR 1991 MP 18 (case law discussed); *Ranganayakiammal v R Srinivasaraghavan* AIR 1990 Mad 379 (property given under a will—recital in will as to wife asking for some property for maintenance—ruled right becomes absolute right); *Angammal v Ramalinga* AIR 1992 Mad 246; *M Shanmugha Udayar v Sivanandanam* AIR 1994 Mad 123 (property allotted to widow on partition, presumption of full ownership arises); *Atava Akulamma v Gajjela Reddy* AIR 1995 AP 166 (case law discussed); *Kutha Ammal v Lakshmana Nadar* AIR 2001 Mad 320 (property in recognition of maintenance right—full owner); 48 *Subhan Rao v Parvathy Bai* AIR 2002 Kant 134 (property settled on illegitimate son's wife); *Jamuna Bai v Bhola Ram* AIR 2003 MP 40; *Yemanappa v Yellubai* AIR 2003 Kant 396 (in lieu of maintenance).

64 (1998) 6 SCC 314.

65 *Smt Beni Bai v Raghubir Prasad* AIR 1999 SC 1142; *Yadala Venkata Subbamma v Yadalla Chinna Subbaiah* AIR 2001 SC 1664.

66 *Palchuri Henumayamma v Tadikamella Kollingam* AIR 2001 SC 3062.

67 *Namo Devi v Rattan Chand* AIR 1990 HP 47.

widow. Such provision must necessarily blossom into a full estate since it would be in lieu of a pre-existing right of maintenance.⁶⁸ Since a Hindu female has a right to be maintained against the properties of her husband, if the husband leaves the property to his father and the father settles some property of such widow in recognition of her pre-existing right to maintenance, such widow would become full owner of such property and has a right of disposition of the same.⁶⁹ So also, a gift of ancestral property by a father to a widowed and destitute daughter, flowing from an obligation to maintain the daughter, would confer full ownership of such property on such a daughter.⁷⁰ When the father under a will gave a right to his daughters to enjoy the property, till death and further stipulated that on their death, the property was to revert to his collaterals. On the coming into force of this Act, the unmarried daughter became absolute owner, however after her death the property would devolve on the married daughter. Such married sister would have preference in inheritance over the son of the brother of the father (testator).⁷¹

The right of a destitute widowed daughter to claim maintenance from her father is well-recognised. If the father bequeaths some property on the widow daughter in recognition of such a right, it would confer full ownership on the daughter. If however, the father had died intestate, the daughter would have a right to succeed to her father's estate, which would have been a *spec successionis*, and not a pre-existing legal right so as to have sustained a claim under this section read with s 8, successfully.⁷²

Also see notes under §546 (Vol I).

If however, on a partition taking place, some property is allotted to a male member of the family, subject to the stipulation that during her lifetime, his widowed mother would have a right of residence in such property, the mother would not get any right under this section since no title or interest has been conferred. Thus, the decision of the Supreme Court in *Tulasamma's* case⁷³ will not apply in this case.⁷⁴

Attention is invited to the undermentioned decision of the Supreme Court, which reviews the case law on the applicability of ss 14(1) or 14(2). In the above case, it was held that if property is acquired by a widow in recognition of her pre-existing right of maintenance, sub-s (1) would

68 *Mangat Mal v Punni Devi* AIR 1996 SC 172; *Nazar Singh v Jagjit Kaur* AIR 1996 SC 855.

69 *M Muthusami v Angammal* AIR 2001 SC 1279.

70 *Laxmappa v Balawa KT Chawadi* AIR 1996 SC 3497; *Pancharan Samanta v Laxmi Mandal* AIR 1989 Cal 242.

71 *Tara Mani v Narinder Kumar* AIR 2002 P&H 365.

72 *Balwant Kaur v Chanan Singh* AIR 2000 SC 1908 (Reversing *Chanan Singh v Balwant Kaur* AIR 1984 P&H 293).

73 *Tulasamma v Shesha Reddi* AIR 1977 SC 1944.

74 *Chinnammal v Kannagi* AIR 1989 Mad 185; see *Framma v Verrupana* AIR 1966 SC 1879.

apply and if she gets the right for the first time under any instrument or order, without there being any pre-existing right sub-s (2) would apply. If, therefore, the widow had transferred her right before the coming into force of this Act, she cannot be said to be possessed of the property and cannot get the benefit of s 14(1). Any female Hindu could only alienate her limited right in any estate, prior to this Act coming into operation, provided such property was in her possession, and that too only for legal necessity. If the alienation was without legal necessity, the alienee would only get a right to enjoy the property during the life time of the widow. It is only such a residuary right which could be deemed to have been transferred by the widow. On the death of the widow, such property would therefore revert to the reversioners of the husband.⁷⁵

Attention is also invited to notes under the heading 'possessed and 'remarriage' supra.

V died in 1931 in a state of jointness with his brother S and left surviving him his widow T and brother S. In certain proceedings, wherein T claimed maintenance, there was ultimately a compromise and certain properties were allotted to her, but with no power of alienation at all. The properties were to revert to S on the death of T. It was held that on the coming into force of this Act the case fell within the ambit of sub-s (1), and not sub-s (2) and T had become an absolute owner of the properties.⁷⁶

Having regard to the decisions of the Supreme Court referred to above it would make no difference whether the property was allotted to the Hindu widow after her husband's death before 1937 or after her husband's death which took place after the Hindu Women's Right to Property Act 1937 came into force. If, however, a widow was receiving only maintenance and no property was allotted to her in lieu of maintenance, sub-s (1) would not be attracted and she would not be entitled to any benefit under it.⁷⁷

The principle can be applied to the case of an unmarried daughter in possession of joint family property in lieu of maintenance.⁷⁸

Decree

Sub-section (2) contemplates only those cases where the decree in question had become final and was not under appeal when the Act came into

75 *C. Masilamani Mudaliar v Idol of Sri Swaminath Swamy* (1996) 8 SCC 525, which follows *Tulasamma's* case and overrules *Gumptha v Jaibai* (1994) 2 SCC 511 holding that the decision places a restricted interpretation; *Nareesh Kumar v Sakshi Lal* AIR 1999 SC 928. *Nallan alias Keerimuthan v Vellalyankudumban* AIR 2001 Mad 6.

76 *Tulasamma v Sesha Reddi* AIR 1977 SC 1944.

77 *Sulabha v Abhimanyu* AIR 1983 Ori 71; *Pachi Krishnamma v Kumaran Krishnan* AIR 1982 Ker 137 (widow not in possession of any property).

78 *Shiv Narain v Raji* AIR 1982 P&H 119.

force.⁷⁹ The decree must be the source of title.⁸⁰

The section envisages that property can also be acquired by a female hindu under a decree. Thus when land is allotted in lieu of maintenance albeit with an embargo against alienation, such a clog would not restrain the female from being conferred a full ownership.⁸¹

Restricted Estate

Sub-section (2) does not require that the restricted estate must be prescribed in express terms. Normally any acquisition of property covered by this sub-section would be by an instrument in writing or by decree or award.⁸² Whether any restricted estate has been created or not in any such case must obviously be a question of construction to be determined in accordance with the canons of construction applied with regard to such instrument, decree, order or award.⁸³

Restrictions by way of conditions or limitations envisaged by this sub-section must be such as recognised as valid. They must not be repugnant to or prohibited by any statutory enactment affecting the parties and where there is no statutory rule affecting the matter they must be such as to not result in any estate unknown to Hindu law.

Civil Court

The expression 'Civil Court' in the sub-section has been interpreted by the High Court of Orissa as including a Deputy Commissioner acting as revenue court.⁸⁴

15. General rules of succession in the case of female Hindus.—(1)

The property of a female Hindu dying intestate shall devolve according to the rule set out in section 16,—

- (a) firstly, upon the sons and the daughters (including the children of any pre-deceased son or daughter) and also the husband;

⁷⁹ *Annapurnamma v Bhima Sankerrao* AIR 1960 AP 359; *Pathumma Beebi v Krishnan Asari* AIR 1961 Ker 247; *Rampali Devi v Chando Bibi* AIR 1966 All 584 (decree must also be one affording foundation of title and not merely declaratory); *Saraswathi Ammal v Anantha* AIR 1968 Ker 66; *Venkamma v Venkatarreddi* AIR 1959 AP 158.

⁸⁰ *Chajju Ram v Bhuri* AIR 1969 Del 273.

⁸¹ *Lal Chand v Kali Bai* AIR 2004 P&H 173.

⁸² According to the Punjab High Court, there can be an oral gift within the ambit of this sub-section; *Balanda v Dunnt Chand* AIR 1963 Punj 34.

⁸³ A grant of property for enjoyment for time being willed not attract the section. *Devendra Singh v State of Madhya Pradesh* AIR 1976 Mad LJ 437.

⁸⁴ *Arakhita v Hari* AIR 1963 Ori 162, (1963) ILR Cut 628.

- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1),—

- (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and
- (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

SUCCESSION TO PROPERTY OF A FEMALE DYING INTESTATE

This section propounds a definite and uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. The rules laid down in this section are pivotal and have to be read along with the rules set out in s 16. They have also to be read along with certain other section in the chapter which contain supplementary provisions which are not merely explanatory, but lay down substantive rules involving legal principles.

The section groups the heirs of a female intestate into five categories described as Entries (a)–(e) and specified in sub-s (1). Sub-section (1), however, is not a complete statement of the law. Two exceptions both of the same nature are engrafted by sub-s (2) on the otherwise uniform order of succession prescribed by sub-s (1). Broadly stated, the two exceptions are that if the female dies *without leaving any issue*, then: (1) in respect of property inherited by her from her father or mother, that property will devolve not according to the order laid down in the five Entries, but upon the heirs of the father; and (2) in respect of property inherited by her from her husband or father-in-law, it will devolve not according to the order laid down in the five Entries but upon the heirs of the husband.

The basis of inheritance of a female Hindu's property who dies intestate would thus be the source from which such female Hindu came into possession of the property and the manner of inheritance which would decide the

manner of devolution.⁸⁵

The two exceptions mentioned above are confined to property 'inherited' from the father, mother, husband and father-in-law of the female Hindu and do not affect property acquired by her by gift or by device under a will of any of them. Property acquired by her under any device or bequest under a will from any such person would devolve on her death in the manner prescribed in sub-s (1). Reference may be made to notes under sub-s (2).

Under the previous law—succession to *stridhana*—varied according to a woman being married or unmarried. If married, then succession depended on her being married in an approved or unapproved form. It also varied according to the source from which the *stridhana* came and the mode and manner of her acquisition of the property. The rules of descent of the different schools also varied. Section 14 abolishes the various kinds of *stridhana* and property of every kind possessed by female Hindu howsoever acquired and whether once acquired becomes now her absolute property. The present section, which has to be read in conjunction with s 16, evolves a new and uniform order of succession to her property and regulates the manner of its distribution. The provisions in sub-s (1) and sub-s 2 (a) of s 15 do not apply to persons governed by *Marumakkattayam* and *Aliyasantana* laws as will be seen from s 17.

The heritable property of a female intestate devolves upon her heirs enumerated in the five Entries. Among heirs so specified, those in Entry (a) are preferred to those in Entry (b); the heirs in Entry (b) are preferred to those in Entry (c) and so on in case of succeeding Entries.⁸⁶ Therefore, it is only in case of failure of the heirs specified in Entry (a), but not until then, that the property will devolve upon the heirs listed in the next Entry and similarly in order of succession.

In case of property held by a female Hindu as a limited estate on the date of commencement of the Act, she becomes a full owner and on her death, the property devolves in accordance with the rules of this section read with s 16.⁸⁷

When property devolves by operation of Entries (b), (d) or (e) of sub-s (1) upon the heirs therein mentioned, it is the property of the deceased female of which devolution takes place and not of the property of the husband or father or mother.⁸⁸

85 *Bhagat Ram v Teja Singh* AIR 2002 SC 1 (overruling *Amman Kaur v Raman Kumari* AIR 1985 P&H 86).

86 Section 16, r 1; *Meenakshamma v MC Najundappa* AIR 1993 Kant 12.

87 *Mahindero v Kartar Singh* AIR 1991 SC 257 (daughter of a pre-deceased son gets preferential right over husband's sister).

88 *Arunachalathammal v Ramachandran* AIR 1963 Mad 255

PROPERTY

The expression 'property' in this section means property of the deceased heritable under the Act. It includes both movable and immovable property owned by a female Hindu and acquired by her by inheritance;⁸⁹ or by devise; or at a partition; or by gift from any person whether her relative or not (before, at or after her marriage); or her own skill or exertion; or by purchase; or by prescription; or in any other manner whatsoever. It also includes all property, which was held and possessed by her at the date of the commencement of the Act and of which she is declared to be the full owner by s 14 of the Act.

A died in 1927, leaving surviving him his widow W and a married daughter D. W who was in possession of the property left by A, who died in 1946. D died in 1958 leaving her surviving daughter D1, her son S and four children of a daughter D2 who had pre-deceased D. In a suit by D1 for partition and possession of a one-third share, it was held that D had become full owner of the property (s 14) in 1956 when the act came into operation and succession to her property would be under this section and the claim of D1 was upheld.⁹⁰

In a case before the High Court of Punjab and Haryana,⁹¹ D gifted her entire estate in favour of her daughters A and S. Both daughters were alive when the present Act came into force. S died in 1972 without leaving her husband or a descendant. At the time of her death, her husband's son HS, by a previous deceased wife, was alive. HS died after the death of S leaving behind his widow and children. The court held that the estate of S would be inherited by the widow and children of HS under sub-s (1)(b) of this section and the case would not be governed by sub-s (2). This view has been overruled by the Supreme court in the case of *Bhagat Ram v Teja Singh supra*, while holding that the source of the females coming into possession is important in deciding the manner of devolution.

The rules of succession laid down in this section apply to agricultural land subject however to this that legislation relating to prevention of fragmentation of agricultural holdings or fixation of ceilings or the devolution of tenancy rights in respect of such holdings is not to be affected by anything contained in the Act. However, the rules of succession laid down in this section do not apply to property expressly excluded from the operation of the Act by s 5.

The rules of succession laid down in this section cannot apply to property acquired by a female under an instrument or a decree or an order of a Civil Court or under an award which itself prescribed a restricted estate in such

⁸⁹ *Balasabeh v Jinwala* AIR 1978 Bom 44 (inherited from brother).

⁹⁰ *Mummusami v Rajambal* AIR 1977 Mad 228; *Daya Singh v Dham Kaur* AIR 1974 SC 665; *Kumaraswami v DR Nanjappa* AIR 1978 Mad 285 (FB).

⁹¹ *Ammar Kaur v Raman Kumari* AIR 1985 P&H 86; *Jai Singh v Mughla* (1967) 69 PLR 475.

property. In any such case succession to such property would be controlled by the nature and extent of the restricted estate thereby created.⁹²

Nor can the rules of succession laid down in this section apply to the case of the death of a female, who had acquired property as a limited owner and alienated the same before the commencement of the Act. In her case s 14 would not become applicable as the property cannot be regarded as property of the deceased intestate.⁹³

PROSPECTIVE OPERATION: 'PROPERTY OF A FEMALE HINDU... SHALL DEVOLVE...'

The language of the section and particularly the words 'shall devolve' plainly indicate that the section is prospective in its operation. It applies where death of a female intestate and consequent devolution of her property takes place after the commencement of the Act and does not govern succession to the property of a female Hindu whose death took place before the Act came into force. In the latter case, all questions of inheritance would be determined according to the previous law.

ORDER OF SUCCESSION

The effect of the rules laid down in this section is that the property of a female intestate will devolve as summarised in the following propositions:⁹⁴

- (1) *The general order of succession* laid down in entries (a) to (e) in sub-s (1) applies to all property of a female intestate however acquired except in case of property inherited by her from her father, mother, husband or father-in-law.
- (2) In case of a female intestate leaving a son or a daughter or a child of a predeceased son or of a predeceased daughter, that is leaving any issue, all her property, howsoever acquired, devolves on such issue regardless of the source of acquisition of the property and such issue takes the property simultaneously; and if the husband of the intestate is alive they take simultaneously with him in accordance with entry (a). In such a case sub-s (2) does not at all come into operation.
- (3) In case of a female intestate dying without issue but leaving her husband, the husband will take all her property, except property inherited by her from her father or mother which will revert to the heirs of the father in existence at the time of her death.

⁹² See s 14(2).

⁹³ *Renuka Bala v Aswini Kumar* AIR 1961 AP 498; reference may also be made to the notes under s14.

⁹⁴ In these propositions and subsequent notes on the subject the word 'issue' means son, daughter, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter and daughter of a predeceased daughter.

- (4) In case of female intestate dying without issue property inherited by her from her husband or father-in-law (the husband being dead), will go to the heirs of the husband and not in accordance with the general order of succession laid down in sub-s (1).
- (5) In case of a female intestate dying without issue property inherited by her from her father or mother will revert to the heirs of the father in existence at the time of her death and not in accordance with the general order of succession laid down in sub-s (1).

Propositions (3), (4) and (5) above state the special order of succession, which is confined only to property acquired by the female intestate from the specified sources. Proposition (2) is the obvious corollary to the statement of law in the whole section.

The General Order of Succession

Entry (a)

Specified in the Entry as children of predeceased son or daughter.	 - Son - Daughter - Son of a predeceased son - Daughter of a predeceased son - Son of a predeceased daughter - Daughter of a predeceased daughter - Husband	These are heirs specified in Entry (a). They take simultaneously ⁹⁵ and to the exclusion of those specified in the subsequent entries.

Son

The expression 'son' used in Entry (a) has not been defined in the Act. It includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of the adoption. In case of a female intestate who had remarried after the death of her husband or after divorce her sons by different husbands would all be her natural sons and entitled to inherit the property left by the female Hindu regardless of the source of the property (see illustrations to Entry (a)).

The proviso to s 3(1)(j) lays down inter alia that illegitimate children shall be deemed to be related to their mother and any word in the Act expressing relationship or denoting a relative shall be construed accordingly. Therefore, the expression 'son' used in this Entry also includes an illegitimate son. For

⁹⁵ In accordance with rules in s 16.

'son born of a void or voidable marriage' reference may be made to notes under that heading, *supra* and the illustration given there.

An adopted son would be included in the expression 'son' used in this Entry; that is if the female intestate was in the position of the adoptive mother. Under the old law in force prior to the coming into operation of the Hindu Adoptions and Maintenance Act 1956, a son could be adopted by a male and in certain cases a wife could adopt a son to her husband and a widow could adopt a son to her deceased husband. In all such cases of adoption, made before that Act came into operation, the adopted son will be an heir of the adoptive mother under this Entry.

Under the Hindu Adoptions and Maintenance Act 1956, s 14, a son adopted by a Hindu who has a wife living, is deemed also to be her adopted son and she is in the position of his adoptive mother; and when the adoption is made by 'a person who has more than one wife, the seniormost in marriage among them is deemed to be the adoptive mother and the others to be his step-mothers. In any such case, the adopted son will be a 'son' of the adoptive mother within the meaning of this Entry.

Under s 8 of the Hindu Adoption and Maintenance Act 1956, a female Hindu, who is not married or, if married, whose marriage has been dissolved or is a widow or whose husband has renounced the world or ceased to be a Hindu or has been declared by a court to be of unsound mind, now has the capacity to take a son or daughter in adoption to herself. Such a son is, therefore, an heir under this Entry. Reference may be made to notes under s 8 of that Act.

Also see 'Relative by adoption', *supra* and s 5, 7, 8, 11, 12 and 14 of the Hindu Adoptions and Maintenance Act 1956.

A step-son is not entitled as 'son' to inherit to his step-mother as one of the heirs under this Entry, but he can succeed to her property as an heir of her husband under Entry (b) of the sub-section⁹⁶. In *Lachaman Singh v Kirpa Singh*, the Supreme Court⁹⁷ approved of the view that 'sons' in cl (a) does not include step-sons. Similar would be the position of a step-daughter. She would not be entitled as 'daughter' to inherit to her step-mother as one of the heirs under this Entry. When property devolved upon the testatrix from her father, the will, leaving out the step-son would not be impeachable on that ground.⁹⁸

⁹⁶ Quoted with approval in *Mallappa v Shivappa* AIR 1962 Mys 140, *Gurnam Singh v Ays Kaur* AIR 1977 P&H 103; *Holya v Jasoda* (1977) 111 J 395; *Kishori Bala v Tribhanga* AIR 1980 Cal 331, contra *Ram Kotari v Prakashwati* (1968) 11 R 1 All 697; *Bagwan Dass v Pratibha Rani* AIR 2004 Del 137 (step-son not entitled when husband was alive).

⁹⁷ *Lachaman Singh v Kirpa Singh* AIR 1987 SC 1616 (case law examined). Also see *Rattan Prakash v Bela Sihare* AIR 1996 Del 356.

⁹⁸ *Janardan Patel v Sheth Ambalal Himatlal* AIR 1999 Guj 162.

A posthumous son of her husband by her is as much a natural son of the female as a son born during the lifetime of her husband.

Illustrations under Entry (a) may also be referred.

Daughter

The rules relating to a 'son' stated above apply *mutatis mutandis* to the case of a daughter.

Daughter of pre-deceased wife: With reference to co-widows, it has been stated (s 14 *supra*) that they take the property as common owners. In a case decided by the Bombay High Court, a man had three wives, one wife pre-deceased him, living behind a daughter. When succession opened, on his death, two widows were alive. One of the remaining widows died intestate and the surviving widow then left behind a daughter. The surviving widow's daughter filed proceedings against the daughter of the widow who had predeceased the husband, claiming that that daughter had no rights in the property and consequently, her alienees also did not acquire any rights. It was held that the daughter of the predeceased wife had no right in the property, and since, from the other widows, one had died intestate, the daughter of the surviving widow (ie, the plaintiff), inherited the property absolutely. The reasoning was that the daughter of the pre-deceased widow would not be entitled to the property in view of s 15(a), by virtue of which the property of a female Hindu dying intestate shall devolve firstly upon her sons and daughters (including the children of any pre-deceased son or daughter) and also upon the husband. In this case the daughter of the pre-deceased widow would not be entitled to a share in view of the exclusionary clause, since she could inherit only if there was absence of heirs enumerated in s 15(a).⁹⁹

Step-daughter

See 'step-sons' above.

Adopted son and adopted daughter

Under the provisions of the Hindu Adoptions and Maintenance Act 1956, a female Hindu is competent to have both an adopted son and an adopted daughter. Therefore, under this Entry, both, an adopted son and an adopted daughter can be her heirs and take simultaneously.

Sons of predeceased son

The son of a predeceased son is entitled to succeed as a child of a predeceased son under Entry (a) and includes both a natural son of a predeceased son and a son of a predeceased son adopted by the latter in accordance with the law relating to adoptions among Hindus in force at the

⁹⁹ *Bhika Bai v Manita Bai* AIR 2000 Bom 172.

time of adoption. The proviso to s 3(1)(j) lays down inter alia that illegitimate children shall be deemed to be related to their mother and their legitimate descendants shall be deemed to be related to them and to their mother, and any words expressing relationship or denoting a relative shall be construed accordingly. Therefore, a legitimate son of a predeceased illegitimate son of a female is an heir under this Entry. A posthumous son of the predeceased son is also included in this Entry.

Also see 'Relative by adoption', supra and ss 5, 7, 8, 11, 12 and 14 of the Hindu Adoptions and Maintenance Act 1956. Also see 'Son', supra, and illustrations under Entry (a), infra.

Daughter of a predeceased son

The rules relating to 'son of a predeceased son' stated above apply *mutatis mutandis* to the case of a daughter of a predeceased son.

Son of a predeceased daughter

The son of a predeceased daughter is entitled to succeed as a child of a predeceased daughter under Entry (a) and includes both a natural son of a predeceased daughter and a son of a predeceased daughter adopted by the latter in accordance with the law relating to adoptions among Hindus in force at the time of adoption. If the daughter had remarried after the death of her husband or after divorce, her sons by different husbands would all be her natural sons. Proviso to s 3(1)(j) lays down that illegitimate children shall be deemed to be related to their mother and their legitimate descendants shall be deemed to be related to them and to their mother, and any words expressing relationship or denoting a relative shall be construed accordingly. Therefore, a legitimate son of a predeceased illegitimate daughter of a female is an heir under this Entry. A legitimate son of the predeceased daughter who was in her womb at the time of the death of the intestate is also included in this Entry.

Also see 'Relative by adoption' and ss 5, 7, 8, 11, 12 and 14 of the Hindu Adoptions and Maintenance Act 1956.

Daughter of a predeceased daughter

The rules relating to son of a predeceased daughter stated above apply *mutatis mutandis* to the case of a daughter of a predeceased daughter.

Husband

The husband entitled to succeed under this entry must be a person who was lawfully married to the female intestate and whose marriage had not been annulled or dissolved by a decree of a court or dissolved by any valid custom governing the parties.¹ In general, the effect of annulment or

¹ Section 29(2) Hindu Marriage Act 1955.

dissolution of marriage is total severance of all relationship between the divorcee and the other spouse as his relations. However, a decree for judicial separation or non-compliance with a decree for restitution of conjugal rights does not have the effect of dissolving the marriage. Illustrations below may also be seen.

Illustrations

- (i) *A* dies leaving surviving her a son *S*; two daughters *D* and *D1*; *DD2* the daughter of a predeceased daughter *D2*; *SS1* the adopted son of a predeceased son *S1*; and *SSS2* the son of a predeceased son of a predeceased son *S2*. All the property of *A*, howsoever acquired, will devolve simultaneously upon *S*, *D*, *D1*, *SS1* and *DD2* as heirs specified in Entry (a). *SSS2*, although a great-grandson of *A* will not succeed as her heir with the others.² He is not an heir under Entry (a) and will be excluded by the others who are heirs specified in that Entry.
- (ii) *A* dies leaving her surviving a son *S*; an adopted daughter *D*; and her husband *H*. All the property of *A*, howsoever acquired, will devolve simultaneously upon *S*, *D* and *H* as heirs specified in Entry (a).
- (iii) *A* dies leaving her surviving a son *S* by her first husband and property which she had inherited from her second husband *B*. The property will devolve upon *S* under Entry (a) and not upon the heirs of *B*.³
- (iv) *A* dies leaving her surviving a son *S* by her first husband and a daughter *D* by her second husband. All the property of *A* howsoever acquired and including property inherited by her from either or both her predeceased husbands will devolve upon *S* and *D* in equal shares.⁴
- (v) *A* dies leaving her surviving daughter *D* by her first husband and children of her second husband. The property inherited by *A* from her second husband will devolve upon *D* and not on the children of the second husband (step-children).⁵
- (vi) See illustrations under sub-s (2), cl (b), *infra*.

² But failing heirs in Entry (a), he may succeed to her property as an heir of the husband under Entry (b). (See Illust i.) Reference may also be made to pedigree in the facts of *Munnalal v Rajkumar* AIR 1962 SC 1493.

³ *Rama Ananda v Bhima* AIR 1969 Bom 205; *Keshri Lodhi v Harprasad* AIR 1971 MP 129; *Dani v Natha Singh* (1978) PLR 267; *Roshan Lal v Dalipa* AIR 1985 HP 8 (immaterial whether the son is by another husband).

⁴ *Ram Kali v Sohan Lal* AIR 1972 P&H 419; *Gurbachan Singh v Khichar Singh* AIR 1971 P&H 240 (son of second husband).

⁵ *Bhagwani v Gilli* (1977) JLJ 137.

Entry (b)***'Heirs of the husband'***

Failing all heirs of the intestate female specified in Entry (a), but not until then, all her property will devolve upon the heirs of the husband as heirs specified in this entry. However, property that she might have inherited from her father or mother will not devolve upon them and will devolve upon the heirs of the father.

The devolution upon the heirs of the husband of the female intestate shall be in the same order and according to the same rules as would have applied if the property had belonged to the husband and he had died intestate in respect thereof immediately after her death (s 16, r 3). The devolution of the property of a male intestate is governed by the general rules of succession declared in s 8; the order of succession laid down in s 9, and the rules of distribution of property stated in s 10, and must be in accordance with other relevant provisions of Chapter II. Therefore, in case of a female intestate who dies without leaving any issue or her husband, the *terminus a quo* will be the husband of the intestate as if he were the *propositus* and the ascertainment of the heirs will once again commence from Class I of the Schedule.

Sections 8, 15 and 16: Heirs of the husband to be ascertained as per the date of death of the female Hindu. Section 15, as the initial part of the section expressly indicates, has to be read with s 16 and r 3. Section 16 states in unmistakable terms that the devolution shall be as if the property had been the husband's and the husband had died immediately after the intestate's death.

Female intestate who had remarried

Where a female intestate had remarried after the death of her first husband, the 'heirs of the husband' would be the heirs of the second husband, who if alive at the time of the death of the intestate would himself have been entitled to succeed as her husband under Entry (a). Therefore, so far as the expression 'heirs of husband' relates to the general order of succession laid down in sub-s (1), the heirs contemplated in Entry (b) must be the heirs of the last husband, that is of the person whose widow the intestate was at the time of her death.

The position, however, is quite different in respect of a case governed by cl (b) of sub-s (2) which has the effect of laying down a special order of succession under which in case of a female intestate who dies without issue, the property inherited by her from her husband or father-in-law does not devolve upon the order of heir or heirs referred to in sub-s (1) in the order specified therein, but upon the heirs of the husband. It follows from the context that the heirs of the husband mentioned in sub-s (2)(b) are not the heirs of the husband she had married after the death of her first husband,

but heirs of 'the husband' whose property she had inherited as his widow; and in case of property inherited from her father-in-law which could only be as the widow of a predeceased son, the heirs there contemplated are heirs of 'the husband' from whose father she inherited the property. Therefore, in respect of property that the intestate might have inherited from her first husband or the father of the first husband as the widow of a predeceased son, such property will, in case of her dying without issue, devolve upon the heirs of that husband. In such a case, the heirs of the second husband cannot succeed to the property of the intestate so inherited by her. Reference may be made to cl (b).

Illustrations

- (i) *A* dies leaving her surviving *SSS* the son of a predeceased son of a predeceased son and *SDS* the son of a predeceased daughter of a predeceased son and *HB* the brother of her husband *H*. *A*'s property will devolve on *SSS* alone as the heirs of her husband under this Entry. *SSS* is the heirs of *H* specified in Class I of the Schedule to s 8 and *SDS* and *HB* are heir specified in Class II of the Schedule. *SSS* will, therefore, exclude *SDS* and *HB*.
- (ii) *A* dies leaving her surviving *S* and *D*, the son and daughter of her deceased husband by another wife, and her brother *B*. *A*'s property will devolve on *S* and *D* under this entry as heirs of the husband. Property that *A* might have inherited from her father or mother will not devolve on *S* or *D* and will devolve on *B* as an heir of *A*'s father.
- (iii) *A* dies leaving her surviving *SHB* and *DHB*, the son and daughter of her husband's brother and *HS* her husband's sister. *A*'s property will devolve on the heirs of her husband *H*. *HS* the husband's sister will take the property to the exclusion of *SHB* and *DHB* as she is an heir specified in Entry II of Class II of the Schedule while *SHB* and *DHB* are heirs specified in Entry IV of that class.
- (iv) *A* dies leaving her surviving *SW*, the widow of *S*, her predeceased son and *B* her brother. The property of *A* will devolve upon *SW* as the heir of her husband under this entry.

These illustrations must be read subject to the rules relating to special order of succession under sub-s (2).

Entry (c)

Mother	}	These heirs specified in Entry (c) succeed simultaneously and share the property equally and to the exclusion of those specified in the subsequent Entries.
Father		

Mother and Father

Failing all heirs of the intestate female specified in Entries (a) and (b), but not until then, all her property, howsoever acquired, will devolve upon her mother and father.

The property that will devolve under this Entry will include property inherited by her from the mother when the intestate is survived by the father and property inherited by her from the father when the intestate is survived by the mother.

Mother

The expression 'mother' includes both a natural mother and an adoptive mother of the intestate. Under the general law in force prior to the coming into operation of the Hindu Adoptions and Maintenance Act 1956, adoption of a daughter was unknown; but under the Act of 1956, which is the first statutory recognition of the status of an adopted daughter, it is now competent to a male as well as a female Hindu to take a daughter in adoption to himself or herself. A daughter adopted by a Hindu who has a wife living, is deemed to be the wife's adopted daughter and the wife is in the position of the adoptive mother; and when the adoption is made by a person who has more than one wife, the seniormost in marriage among them is deemed to be the adoptive mother and the others to be step-mothers.⁶ Again, under s 8 of the Act of 1956, a female Hindu who is not married or if married whose marriage has been dissolved or is a widow or whose husband has renounced the world or ceased to be a Hindu or been declared by a court to be of unsound mind, has now the capacity to take a daughter in adoption to herself. In any such case, the adoptive mother will be a 'mother' of the adopted daughter within the meaning of this Entry. Adoption has the effect of severing all the ties of the daughter and her natural parents and their family and therefore her natural mother is not entitled to succeed to her property as an heir under this Entry.

Unchastity of a mother is no bar to her succeeding as heir to her daughter; nor does remarriage constitute any such bar.

A mother is entitled to succeed to the property of her illegitimate daughter as an heir under this Entry read with s 3(1)(j).

A step-mother is not entitled as 'mother' to inherit to her step-daughter as one of the heirs under this Entry, but she can succeed to her property as an heir of her father under the next Entry.⁷ Reference may be made to notes under Entry (d).

⁶ Section 14, Hindu Adoptions and Maintenance Act 1956.

⁷ *Anbia Mandalanin v Baijnath* AIR 1974 AP 177, 180.

Father

The expression 'father' includes both a natural and an adoptive father of the intestate. The rules relating to 'father' by adoption of a male intestate apply *mutatis mutandis* to the case of an adoptive father of a female intestate.

Illustration

A dies unmarried leaving her father, her step-mother, a step-brother and her mother's brother surviving her. *A* had inherited considerable property from her mother's mother. All the property of *A* will devolve on her father as her heir under this Entry.

Entry (d)

'Heirs of the Father'

Failing all heirs of the female intestate specified in Entries (a)–(c), but not until then, all her property howsoever acquired will devolve upon the heirs of her father. The devolution upon the heirs of the father shall be in the same order and according to the same rules as would have applied if the property had belonged to the father and he had died intestate in respect thereof immediately after her death (s 1, r 3). The devolution of the property of a male intestate is governed by the general rules of succession declared in s 8; the order of succession laid down in s 9; and the rules of distribution of property stated in s 10. Succession in a case falling under this Entry will be in accordance with those sections and other relevant provisions of Chapter II. Therefore in case of a female intestate where there is no heir specified in any of the first three Entries [(a) to (c)], the *terminus a quo* will be the father of the intestate as if he were the *propositus* and the ascertainment of the heirs will once again commence from Class I of the Schedule to s 8.

Illustrations

- (i) *A* dies unmarried leaving her surviving her step-mother *FW* and her brother *B*. *A*'s property will devolve on *FW* and *B* as heirs of her father under this Entry. Property that she might have inherited from her own mother will also be included because it will not on *A*'s death devolve upon the heirs of the mother, but upon the heirs of the father under sub-s (2)(a).
- (ii) *A* dies unmarried leaving her surviving her brother *B* and *WB1* the widow of a predeceased brother. *A*'s property will devolve under this entry on the heirs of her father. *B* and *WB1* will take simultaneously as heirs of the father in Class I of the Schedule to s 8.

Entry (e)***'Heirs of the Mother'***

Failing all heirs of the female intestate specified in Entries (a)–(d), but not until then, all her property, howsoever acquired, devolves upon the heirs of her mother. The devolution upon the heirs of the mother shall be in the same order and according to the same rules as would have applied if the property had belonged to the mother and she had died intestate in respect thereof, immediately after her death (s 16, r 3). The devolution of the property of a female intestate is governed by the general rules of succession declared in this section and must be in accordance with the other relevant provisions of the Act. Therefore, in case of a female intestate when there is no heir specified in any of the first four Entries ((a)–(d)), the *terminus a quo* will be the mother of the intestate as if she were the propositus and the ascertainment of the heirs will once again commence from Entry (a) and so on in order of the Entries.

Uterine Brother and Uterine Sister of the Intestate can Succeed as Heirs of the Mother

Relationship by blood includes relationship by full-blood, half-blood and uterine blood. Two persons are said to be related to each other by uterine blood when they are descended from a common ancestress, but by different husbands (s 3(1)(e)(ii)). Relations by uterine blood have legitimate kinship and can claim relationship by blood with the intestate with the result that a uterine brother or a uterine sister of the intestate will be entitled to succeed to her as son or daughter of her mother specified in Entry (a) of sub-s (1). In a case falling under Entry (e) the mother of the intestate becomes the starting point. All her sons and daughters by different husbands are her sons and daughters within the scope of Entry (a) and are, therefore, entitled to succeed as such.

Illegitimate Brother and Illegitimate Sister

An illegitimate brother or an illegitimate sister of a female intestate who was herself a legitimate offspring, can succeed to her property as an heir of her mother. If the intestate herself was an illegitimate child of her mother the position would be the same. Although the expression 'related' means related by legitimate kinship, the proviso to the definition of 'related' in s 3(1)(j) states an express rule having the effect of giving recognition to the rights of such illegitimate offspring to be deemed as related to their mother and to one another and of their legitimate descendants to be deemed as related to them and to one another. In such a case her illegitimate brother or illegitimate sister, as also the legitimate children of such brother or sister can succeed to the property of the female intestate under this entry.

Illustrations

- (i) *A* dies unmarried, leaving surviving her *MB* her mother's brother, and *MSD* her mother's sister's daughter. If *A*'s mother had died immediately after *A*, she would have been survived only by *MB* and *MSD*, her brother and sister's daughter, respectively. There being no heir of *A* under Entries (a)–(d) all the property of *A* will devolve upon the heirs of the mother. With the mother as the starting point, *MB* and *MSD* will take, simultaneously by reference, to the Entry (d) read with Class I of the Schedule (as the only heirs of the mother's father).
- (ii) *A* dies unmarried leaving her surviving *UB* a uterine brother, *US* a uterine sister and *SF* her stepfather, her mother having remarried after the death of *A*'s father. There being no heir of *A* under entries (a)–(d) all the property of *A* will devolve upon the heirs of the mother. With the mother as the starting point, *UB*, *US* and *SF* will take simultaneously by reference to Entry (a).
- (iii) *A* and *C* were the illegitimate daughters of *M*, their mother. *C* had married and died during *A*'s lifetime leaving her surviving her son *CS*, and *CSS*, the son of a predeceased son. *A* dies unmarried leaving surviving her *CS* and *CSS*. All the property of *A* must devolve upon the heirs of *M* with *M* as the starting point. *CS* being the daughter's son of *M* will take the property to the exclusion of *CSS* who does not come under Entry (a) (see s 3 (1)(j)).
- (iv) *A* and *C* were the illegitimate daughters and *B* was the illegitimate son of *M*, their mother. *B* had married and died during the lifetime of *A* leaving surviving him *BS*, his son. *C* died during the lifetime of *A* leaving her surviving *CD*, an illegitimate daughter. *A* dies unmarried leaving her surviving *BS* and *CD*. All the property of *A* must devolve upon the heirs of *M*. *BS* being the legitimate descendant of the illegitimate son of *M* will take the property to the exclusion of *CD*, who is the illegitimate daughter of *C*, the illegitimate daughter of *M*. In this case if *C* had survived *A* she would have succeeded to *A*'s property simultaneously with *BS* (see s 3 (1)(j)).

SPECIAL ORDER OF SUCCESSION IN CASE OF CHILDLESS FEMALE INTESTATE IN RESPECT OF PROPERTY INHERITED BY HER FROM HER FATHER, MOTHER, HUSBAND OR FATHER-IN-LAW

Sub-section (1) lays down the general order of succession to the property of a female intestate who dies after the commencement of the Act and propounds a definite scheme of succession to her property which is different from the order of succession to the property of a male intestate. Sub-section

(2) carves out two exceptions to that general scheme and order of succession. Clause (a) of sub-s (2) relates to property inherited by the intestate from her mother or father and cl (b) relates to property inherited by her from husband or father-in-law. The two exceptions, both of the same nature, seem to have been made on the ground that they prevent such property passing into the hands of persons to whom justice would require it should not pass and on the ground that the exceptions are in the interest of the intestate herself.

Sub-section (2) is not violative of arts 14 and 15 of the Constitution on the ground that it enacted a preferential treatment in favour of a male member of the family and as such introduces sex discrimination with regard to the property of the female.⁸

CLAUSE (A): PROPERTY INHERITED FROM FATHER OR MOTHER

This clause engrafts an important exception on the provisions relating to the general order of succession to the property of a female intestate laid down in sub-s (1). This exception provides for a special order of succession in case of property inherited by her from her father or mother, but its operation is confined to the case of her dying without leaving a son or a daughter or children of any predeceased son or daughter. The clause enacts that in any such case the property so inherited is to devolve 'not upon the other heirs but upon the heirs of the father', meaning thereby, that the property is not to devolve upon the heirs other than sons and daughters and children of predeceased son or daughter who would have inherited if the order specified in sub-s (1) were to be followed but such property is to devolve upon the heirs of the father. The other heirs—but for the exception provided in this clause—would have included the husband or the heirs of the husband by application of the latter part of Entry (a) and Entry (b) of sub-s (1) and the purpose of the clause is that such property should not pass into their hands but should go instead to the heirs of the father.⁹ Question may arise as to what is to happen in respect of property inherited by the female Hindu from her mother and the father is alive at the time of the death of the female Hindu. In such a situation would the property devolve on the father or only on the heirs of the father, although the father is alive? It would seem that this is one of the cases where the Court has to interpret the provision so as to give effect to the manifest intention of the lawmaker, which undoubtedly is that such property should not go to the husband. It stands to reason that the Court would so interpret the section so as not to include the husband in any such situation.¹⁰

⁸ *Sanubai v Bala* AIR 1983 Bom 156.

⁹ *Raghuvar v Janki Prasad* AIR 1981 MP 39.

¹⁰ *Bhimadas v P Kanthamma* AIR 1974 AP 266; *Durpyodhan Swami v S Sethi* (1977) 2 Cut WR 569.

The effect of this clause read with r 3 of s 16 is that in the case of a female intestate dying without issue the property inherited by her from her father or mother will not devolve upon the husband under Entry (a) of sub-s (1), or on the heirs of the husband under Entry (b) of sub-s (1), but will devolve upon the heirs of the father as if the father had died intestate in respect thereof immediately after her death.

Of course, as already indicated, if the female Hindu died leaving any issue enumerated in sub-s (1)(a), no question arises of the application of this clause and the property will devolve as prescribed in sub-s (1)(a) (see Illustr (i) below).

The exception laid down in this clause is confined to property 'inherited' from the father or mother of the female Hindu as heir of the father or mother, that is, by succession, and does not affect property acquired by her by devise under a will of the father or mother. Property acquired by her under any devise or bequest under a will would devolve on her death in the manner prescribed in sub-s (1)¹¹ (see Illustrations (vi) and (vii) below). Nor would property given to her by way of gift by her father or mother fall under this exception¹² (see Illustration (viii) below). Nor would property inherited by the female Hindu from her brother fall under this exception.¹³

Illustrations: Clause (a)

- (i) *A* dies, leaving her surviving, *DD* her daughter's daughter, *H* her husband and *M* her mother. *A* had inherited property from her father. All property of *A* including that inherited by her from her father will devolve simultaneously on *DD* and *H*. The case does not fall under cl (a) of sub-s (2) because *A* had left issue. It is governed by Entry (a) of sub-s (1).
- (ii) *A* dies, leaving her surviving, *H* her husband, *M* her mother and *B* her brother. *A* had inherited property from her father. *A*'s (other) property will devolve on *H*; but the property inherited by *A* from her father will not devolve on *H* and will devolve on *M* and *B* who will take it simultaneously as heirs of her father.¹⁴
- (iii) *A* dies, leaving her surviving, her brother and her step-mother (her father having married again after the death of *A*'s mother). *A* had inherited the property from her mother. The property will devolve upon the brother and the step-mother in equal shares as heirs of her father.¹⁵

¹¹ *Jayantilal v Chhanalal* AIR 1968 Guj 212; *Kameshwararao v Vasudevrao* AIR 1972 AP 189.

¹² *Ayi Ammal v Subramania Asari* AIR 1966 Mad 369; *Meyappa v Kanappa* AIR 1976 Mad 154.

¹³ *Balasabeb v Jaimala* AIR 1978 Bom 44.

¹⁴ *Raghuwar v Janki Prasad* AIR 1981 MP 39.

¹⁵ This illustration has been remodelled after an error in it was pointed out in the decision in *Rangamma v Annapuramma* AIR 1963 Mys 168.

- (iv) *A* dies, leaving her surviving, her father's sister and her father's brother's son. *A* had inherited property left by her father. The property will devolve on the father's sister in preference to the father's brother's son, as a sister under Class II of the Schedule is a nearer heir than a brother's son.¹⁶
- (v) *A* dies, leaving her surviving sons and daughters of her father's sister and sons and daughters of her father's brother. *A* had property which she had inherited from her mother who in her turn had inherited the same from her husband, that is *A*'s father. *A* became a full owner of the property when the Act came into force in 1956. The property will devolve on all the children of the father's sister and the father's brother simultaneously and in equal shares.¹⁷
- (vi) *A* dies leaving her surviving *FBD* her father's brother's daughter, *MB* her mother's brother, and *MS* her mother's sister. *A* left property which she had inherited from her mother. The property will devolve on *FBD* as heir of her father.
- (vii) *A* dies leaving her surviving *H* her husband, *B* her full brother and *US* her uterine sister, her mother having remarried after the death of her father. *A* left property which she had inherited from her mother. The property will not devolve upon *H* but will devolve upon *B* as heir of *A*'s father. *US* is not an heir of *A*'s father and cannot claim any share. Also, see Illustration 2 under Entry (b) of sub-s (1).
- (viii) *K* died childless leaving her surviving her husband as her nearest heir. *K* had acquired property under a will of her mother *M*, whereby *M* had devised her property in favour of *K* as a legatee. The property will devolve upon the husband of *K* under cl (a) of sub-s (1) and not upon any heir of *K*'s father under sub-s (2)(a).¹⁸
- (ix) *K* had acquired property under the will of her mother. *K* died after her husband. The property will devolve upon her husband's brother's son under cl (b) of sub-s (1) and not upon any heir of her father under sub-s (2)(a).¹⁹
- (x) *K* who was a widow died without leaving any issue. *K* left property, which she had received by way of gift from her father during the father's lifetime. The property will devolve upon the heirs of *K*'s husband under cl (b) of sub-s (1) and not upon *K*'s brother under sub-s (2)(a). This is because sub-s (2)(a) applies only to property which was 'inherited' by the female Hindu.²⁰

16 *Aparti Bewa v Suna Stree* AIR 1963 Ori 166.

17 *Arunachalathammal v Ramachandran* AIR 1963 Mad 255.

18 *Jayantilal v Chhanalal* AIR 1968 Guj 212.

19 *Kameshwararao v Vasudevarao* AIR 1972 AP 189.

20 *Art Ammal v Subramania Asari* AIR 1966 Mad 369, *Om Meyyappa v Kannappa* AIR 1976 Mad 155.

- (xi) *C* died in 1947 leaving surviving him his daughter *B* by his first wife and *CW* his second wife whom he had married after the death of *B*'s mother. *CW* remarried before the Hindu Succession Act 1956 came into force and *B* became entitled to the entire property left by her father. *B* died unmarried after coming into force of the Act of 1956 leaving her surviving the step-mother and her father's sister. It was held that *CW*, the step-mother having remarried before 1956 she could not be regarded as an heir of the father of *B*; nor could she be regarded as the mother of *B*. The property left by *B* would go to the sisters of *C* as the heirs of the father of *B* under the present clause.²¹
- (xii) *A* died in about 1933 leaving surviving him his widow *R*, a daughter *M* and his sister *S*. *R* died in 1945 and *M* became entitled to the property left by *A*. She became absolute owner of the property in 1956 when the Hindu Succession Act came into force. *M* died in 1969 survived only by her husband. The property will devolve not on her husband, but on *S* as the heir of *M*'s father under the present clause.²²

Questions may arise as to the devolution of property of the female intestate dying without leaving any issue when the property left by her had been inherited by her father or mother and there is no heir of the father at the time of her death, but the other heirs are alive as mentioned in sub-s (1) such as the husband or the husband's heirs or the mother's heirs. It was evidently not the intention of the authors of the enactment that in such a case the property should not go to any of such persons although they are referred to in sub-s (1). The clause seems only intended to affect and modify the general order of succession prescribed in sub-s (1) by varying 'the order specified therein' and giving preference to the heirs of the father. There is nothing in the language of the section to prevent such property devolving on the husband or the heirs of the husband in any case and cl (a) must be read as applying to the situation envisaged by it, namely, when there are heirs of the father alive when the succession opens. In case of failure of the heirs of the father in any such case, this cl (a) would have no application and succession would be governed by the rules laid down in sub-s (1). In such a case of failure of the father's heirs, the property that might have been inherited by the female intestate from her mother will devolve upon the husband or the husband's heirs (where there are any such heirs) and not upon the heirs of the mother and if it was the intention of the legislature that in case of the female intestate dying without issue property inherited by her from her father or mother should go in that

21 *Anbia Mandalanin v Baijnath* AIR 1974 Pat 177.

22 *Her Jesa Kachra v Lakhman* AIR 1979 Guj 45 (provisions of the Land Revenue Code cannot be read as laying down rules of succession).

direction and not devolve upon her husband or husband's heirs, such intention has not become fully effective.

Identity of Property

Sub-section (2)(a) speaks of property inherited in the context of succession and the mere fact that the identity of the inherited property has been changed by the deceased female, for instance, where the property was cash and she had invested the same in some securities or any immovable property, would not render the clause inapplicable. It is submitted that the property so substituted would also devolve on the heirs specified in the clause. A different view has been taken in the undermentioned decision.²³

CLAUSE (B): PROPERTY INHERITED FROM HUSBAND OR FATHER-IN-LAW

This clause engrafts another exception on the provisions relating to the general order of succession to the property of a female intestate laid down in sub-s (1). This exception provides for a special order of succession in case of property inherited by her from her husband or her father-in-law, but its operation is confined to the case of her dying without leaving a son or a daughter or children of any predeceased son or daughter, in which case it says the devolution will not be upon the other heirs referred to in sub-s (1). A female may have inherited property from her husband as his heir. She may also have inherited property from her father-in-law as the widow of a predeceased son. In any such case, the property so inherited is to go not to the other heirs referred to in sub-s (1), but to the heirs of the husband. It follows from the context that the heirs of the husband mentioned in this clause are not the heirs of the husband she might have remarried after the death of her first husband but heirs of 'the husband' whose property she had inherited as his widow; and in case of property inherited from her father-in-law which could only be as widow of a predeceased son, the heirs contemplated are heirs of 'the husband' from whose father she inherited the property. The other heirs referred to in sub-s (1) are the father and mother of the intestate and the heirs of the father and the heirs of the mother. It would perhaps seem that cl (b) is redundant in this section because the order of priority in Entries (a) and (b) of sub-s (1) would bring about the same result even in the absence of the clause. Entry (b) read with Entry (a) in effect declares that in case the intestate dies without leaving the husband and any issue the property will devolve upon the heirs of the husband. Nonetheless the clause has a place in this section because it is conceivable that the intestate may have remarried after the death of her husband from

²³ *Veeraraghavamma v G Subbarao* AIR 1976 AP 337.

whom she may have inherited property or after the death of the father-in-law from whom she may have inherited property and may die without issue but leaving her second husband. In such a case, in the absence of the present clause the property so inherited would pass to the second husband. Such a case would not be governed by Entries (a) and (b), but would be governed by the present clause which enacts that such property will not devolve upon the other heirs referred to in sub-s (1), which would include the second husband who survives her, but will devolve upon the heirs of the first husband. The clause is not elegantly drafted but it must follow from the language used that the expression heirs of 'the husband' in the clause refers to the husband whose property had been inherited by the intestate and the reference to the property inherited from the father-in-law as the widow of a predeceased son also indicates that the heirs must be of 'the husband' from whose father she inherited the property. This seems to be the speciality of the situation and it is submitted that the heirs of the husband contemplated by the clause are heirs of the husband who was the source of the inheritance or whose father was the source of the inheritance.

Clause (b) also has a bearing on s 17 which lays down special provisions respecting persons governed by *Marumakkattayam* and *Aliyasantana* laws.

Illustrations

- (i) *A* dies childless leaving her surviving *H2* her second husband whom she remarried after the death of *H* her first husband. *H* had died leaving surviving him his widow *A* and his two brothers *B* and *C*. On the death of *H*, *A* had inherited his entire property. The property so inherited by *A* will on *A*'s death devolve under this clause upon *B* and *C* as the heirs of *H* and not upon *H2*. The same will be the position if *A* had inherited property from the father of *H* as the widow of a predeceased son and thereafter remarried *H2*.
- (ii) *A* had remarried *H2* after the death of *H*, her first husband. *H* had died leaving surviving him his widow *A* and his two brothers *B* and *C*. On the death of *H*, *A* had inherited his entire property. *H2* died during the lifetime of *A*, leaving surviving him his widow *A* and *SH2*, a son by a predeceased wife. On *A*'s death *A*'s (other) property will devolve upon her step-son *SH2*, but the property inherited by her from *H* will revert to the heirs of *H* as if the property had been of *H*, and *H* had died immediately after *A*. *B* and *C* will take the property as 'the heirs of the husband' under this clause. *SH2*, the step-son of *A*, although an heir of *H2* the second husband, will not be entitled to claim such property as an heir of *A*'s husband under Entry (b) of sub-s (1), although the other property left by *A* will devolve upon him.
- (iii) See Illust (iii) and (iv) under Entry (a) sub-s (1).

- (iv) See Illust (ii) under s 10.
- (v) *A* dies, leaving her surviving a son *S* and a daughter *D* by her first husband, and *H2* whom she had remarried after the death of *H*, her first husband. Along with *S* and *D*, *A* had inherited an equal share in the property left by *H* and *A* left that property (her share) when she died. The property left by her will devolve in equal shares upon *S*, *D* and *H2* under sub-s (1)(a) and cl (b) of sub-s (2) will not be applicable. *S* and *D* cannot exclusively claim the property on the ground that the property had been inherited by *A* from *H*.
- (vi) *A* dies leaving her surviving her second husband *H2*. She had inherited property from her first husband *H*. On *A*'s death the property will not devolve on *H2*, but upon the heir of *H*, as if *H* had died incidentally after *A*.²⁴
- (vii) In Illustration 1 above, if instead of inheriting the property, *A* had acquired it by device under the will of *H* or the will of the father of *H* the property will devolve not upon *B* and *C* but upon *H2*. This is because cl (b) only applies to property acquired by inheritance.²⁵
- (viii) The same rule and the same reason as applied in Illust (v) above will apply in case of Illust (ii) above, if the property left by *A* had been acquired by her by device or bequest under the will of her first husband *H*. The property on *A*'s death will devolve upon *H2* and not upon *B* and *C*.

SECTIONS 8, 15 AND 16: HEIRS OF THE HUSBAND TO BE ASCERTAINED AS ON DATE OF DEATH OF THE FEMALE HINDU

Section 15, as the initial part of the section expressly indicates, has to be read with s 16. Rule 3 of s 16 states in unmistakable terms that the devolution shall be as if the property had been the husband's and the husband had died immediately after the intestate's death. The Supreme Court pointed out in *Bajya v Gopikabai*,²⁶ that once it is found that a case falls under sub-s (2)(b) of this section the fiction envisaged in r 3 of s 16 is attracted and it is to be deemed as if the husband had died intestate immediately after the female intestate's death and s 8 will come into operation on that basis.

²⁴ Reference may be made to *Raghuvar v Janki Prasad* AIR 1981 MP 39.

²⁵ Reference may be made to *Jayantilal* and *Ayi Ammal* cases cited above where the identical expression 'inherited' used in cl (a) of this sub-section came up for interpretation in a similar context.

²⁶ AIR 1974 SC 665; see note under s 14 'Reversioners' and the decisions noted there

Certain land was held by *P* who died in 1936 and the holding devolved on his widow *S*. The widow *S* died after the Hindu Succession Act came into force in 1956. *G* claimed that she being the sister of *P* was the heir of *P* on the basis that *P* had died intestate immediately after the death of *S*. It was held, that *G* was entitled to the holding as against those others who would have been heirs of *P* on his death in 1936.

16. Order of succession and manner of distribution among heirs of a female Hindu.—The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely:—

- Rule 1.* Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.
- Rule 2.* If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.
- Rule 3.* The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's, as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

This section read with s 15 may be said to constitute the statute of distribution applicable to heirs of a female intestate. The section lays down rules relating to the order of succession and the mode or manner of computation of shares of the various heirs of a female intestate.

RULES 1 AND 2

Rule 1 contains the explicit declaration of the law that among the heirs enumerated in Entries (a) to (e) of sub-s (1) of s 15, those heirs referred to in a prior Entry are to be preferred to those in any subsequent Entry and those included in the same Entry are to succeed simultaneously. Entry (a) includes sons, daughters, children of predeceased son or predeceased daughter, and husband. These heirs, therefore, take the property simultaneously. The case of children of a predeceased son or daughter is, however, further

governed by r 2 so that the children of a predeceased son or a predeceased daughter will not take per capita with the son or daughter or husband of the intestate, but will take between them the share which their father or mother, as the case may be, would have taken if alive at the time of the death of the intestate, that is to say they will take *per stirpes*. Entry (c) includes mother and father who, in case of absence of heirs of the intestate in Entries (a) and (b), will take simultaneously.

Illustrations

- (i) *A* dies leaving her surviving *H* her husband, *S1* and *S2* her two sons, *SS* the son of *S* a predeceased son, *WS3* the widow of *S3* another predeceased son, *D1* and *D2* two daughters, *DD* the daughter of *D* a predeceased daughter, and *B* her brother. All these except *WS3* and *B* will succeed to *A*'s property howsoever acquired as heirs included in Entry (a) of sub-s (1) of s 15. They will take simultaneously and to the exclusion of *WS3* and *B*. *WS3* could have been an heir only under Entry (b) and *B* could have been an heir only under Entry (d) and are not entitled to succeed, as there are heirs included in Entry (a).

In the above illustration *S1*, *S2*, *SS*, *D1*, *D2*, *DD* and *H* who succeed simultaneously will each take one-seventh share. If *S*, the predeceased son, had instead of *SS*, left more children they would also have taken only one share between themselves and could not have claimed an equal share with *S1*, *S2* and the others. In their case the distribution would have been *per stirpes* and not per capita.

- (ii) *A* dies leaving her surviving *S* a son by her first husband *H1*; and *H2* and *S1* and *D* son and daughter respectively by her second husband *H2*. *A* had inherited property from *H1*. All her property including the property inherited from *H1* will devolve upon *S*, *S1*, *D* and *H2* simultaneously and they will each take a one-fourth share. The case will not be governed by cl (b) of s 15 (2) because *A* dies leaving issues.²⁷

Also, see illustration under s 15.

- (iii) *A* dies leaving her surviving *SW*, the widow of *S* her predeceased son; *SSS1* and *DSS1* the son and daughter respectively of *SS1* the predeceased son of her predeceased son *S1*. None of these are heirs included in Entry (a) of s 15(1), but are heirs of her husband under Entry (b). The property of *A* will be so divided between them that *SW* will take one-half and *SS1* and *DSS1* will each take one-fourth share. However, property that *A* might have inherited from her mother or father will not devolve upon any of these persons

²⁷ Referred to in *Ram Kali v Soban Lal* AIR 1972 P&H 419.

as the heirs of *A*'s husband in accordance with Entry (b), but will devolve upon the heirs of her father under s 15(2)(a).

Also, see illustrations under s 15.

- (iv) *A* dies unmarried leaving her surviving *B*, her brother; *SB1* and *DB1*, the son and daughter respectively of her predeceased brother *B1*; *CS1*, *CS2* and *CS3*, the sons of *C*, her predeceased sister; and *FW*, her stepmother. In the absence of any heirs enumerated in Entries (a) to (c), *A*'s property will devolve upon *B*, *SB1*, *DB1*, *CS1*, *CS2*, *CS3* and *FW* as the heirs of her father. *SB1* and *DB1* will take only one share between them and *CS1*, *CS2* and *CS3* will take only one share between them. The shares of *B* and *FW* will be one-fourth each. The shares of *SB1* and *DB1* will be one-eighth each; and the shares of *CS1*, *CS2* and *CS3* will be one-twelfth each. The distribution will be in accordance with r 3 of s 10. The property to be distributed will include any property that *A* might have inherited from her mother or father.
- (v) *A*'s mother *M* had remarried *MH2* after the death of *A*'s father *F* and left her surviving *A*, *MH2* and *UB* and *US* her son and daughter respectively by *MH2*, her second husband. Upon the death of her mother, *A* had inherited her share of the property left by *M*. *A* dies unmarried leaving her surviving *UB* and *US* (her uterine brother and uterine sister); *MH2* her step father; and *FB* and *FSis* her own father's brother and sister respectively. *A*'s property including property inherited by *A* from *M* will devolve upon *FB* and *FSis* in equal shares as the heirs of her father *F*, in preference to the heirs of her mother (s 15(2)(a)).

RULE 3

The application of this rule in case of devolution of the property of intestate under sub s (1) of s 15 on the heirs of her husband, heirs of her father and heirs of her mother referred to respectively in Entries (b), (d), and (e), of the same has already been pointed out. The rule also applies as has also been pointed out to the devolution of the property of the intestate on the heirs referred in the two clauses of sub-s (2) of s 15, namely, the heirs of the father where she dies without leaving any issue and has left property inherited by her from her father or mother; and the heirs of the husband, where she dies without leaving any issue and has left property inherited by her from her husband or father-in-law.

In all the above cases the *terminus a quo* is the husband or father or mother as if the husband or father or mother were the *propositus* and the ascertainment of the heirs will once again commence from the husband or father,²⁸ father or mother, as the case may be.

²⁸ For instance, see *Mohadevappa v Gauramma* AIR 1973 Mys 142. Reference may also be made to *Krushna Chandra v Nisamani Bewa* AIR 1987 Ori 105 (cognates).

17. Special provisions respecting persons governed by *marumakkattayam* and *aliyasantana* laws.—The provisions of sections 8, 10, 15 and 23 shall have effect in relation to persons who would have been governed by the *marumakkattayam* law or *aliyasatana* law if the Act had not been passed as if—

- (i) for sub-clause (c) and (d) of section (8), the following had been substituted, namely:
 - (c) thirdly, if there is no heir of any of the two classes, then upon his relatives whether agnates or cognates;
- (ii) for clauses (a) to (e) of sub-section (1) of section 15, the following had been substituted, namely:—
 - (a) firstly, upon the sons and daughters (including the children and any pre-deceased son or daughter) and the mother;
 - (b) secondly, upon the father and the husband;
 - (c) thirdly upon the heirs of the mother;
 - (d) fourthly upon the heirs of the father; and
 - (e) lastly upon the heirs of the husband.
- (iii) clause (a) of sub-section (2) of section 15 had been omitted;
- (iv) section 23 had been omitted.

SUCCESSION TO THE PROPERTY OF A MALE OR FEMALE HINDU GOVERNED BY MARUMAKKATTAYAM LAW OR ALIYASANTANA LAW DYING INTESTATE

The Act as expressly stated in s 2 applies to all Hindus. It, therefore, applies to all persons including those who were governed by Mitakshara school, Dayabhaga school as well as those governed by the *Marumakkattayam*, *Aliyasantana* and *Nambudri* systems of law. Devolution of interest in the property of a *tarwad*, *tavazhi* or *illom* in case of persons governed by the *Marumakkattayam* or *Nambudri* law is regulated by s 7(1) of the Act. Devolution of interest in the property of a *kuttumba* or *kavaru* in case of persons governed by the *Aliyasantana* law is regulated by s 7(2) of the Act, and devolution to property known as *sthanam* held by a *sthani* or *sthanamdar* is regulated by s 7(3) of the Act. As regards the separate or self-acquired property of a person, male or female, governed by the *Nambudri* law the rules of succession to be now applied are those laid down in the various provisions in this Act. Succession to the separate or self-acquired property of a person, male or female, governed by the *Marumakkattayam* or *Aliyasantana* law is also governed by the provisions of this Act, but with certain modifications, changes and omissions expressly stated in this section, under the head 'special provisions respecting persons governed by *Marumakkattayam* and *Aliyasantana* law'.

SUCCESSION IN CASE OF MALE INTESTATE

Clause (i) of this section relates to succession to the property of a male Hindu hitherto governed by any of the two systems of law. The initial words of the section so far as they relate to succession to male intestate refer to ss 8, 10 and 23. The effect of cl (i) read with the initial part of the section is by substitution to modify, change and omit certain provisions of the Act and to rule that all the provisions of the Act apply in case of such succession subject to such modification, change or omission. The effect of cl (iv) is that s 23, which contains special provisions respecting dwelling houses, is not to apply in case of succession to the property of a person governed by any of the two systems of law. The general rules of succession laid down in s 8 in their application to the case of succession to the property of a male intestate governed by any of the two systems may be read as laid down in the Act:

The property of a male Hindu, hitherto governed by the *Marumakkattayam* law or *Aliyasantana* law, dying intestate (after the coming into operation of this Act), shall devolve according to provisions of this Chapter:

- (a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;
- (b) secondly, if there is no heir of Class I, then upon the heirs, being the relatives specified in Class II of the Schedule; and
- (c) thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates.

Where a male Hindu governed by any of the two systems dies intestate his property devolves upon two heirs mentioned in the first or the second class (or category) as in any other case according to the general rules laid down in s 8. On failure of heirs in the two classes (or categories) the property devolves upon relatives constituted by the third category which includes relatives, both agnates and cognates. The other provisions of the Act apply to any such case but subject to the variations already mentioned. Reference may be made to the notes under s 8 and particularly to the notes relating to the first two classes under s 8. Reference may also be made to the notes under agnates and cognates under s 8 bearing in mind the rule laid down in the present section, that there is to be no distinction or preference between agnates and cognates in case of persons governed by the two systems. Reference may also be made to the notes under other sections bearing in mind the variations already mentioned.

The modification, as regards succession to the property of a male intestate who was governed by any of the two systems, which affects agnates and cognates, will be seen from the illustrations below which only relate to cases where there is failure of heirs in Classes I and II of the Schedule.

Illustrations

- (i) Illustrations 1–8 under s 9 are equally applicable to the case of a male intestate governed by any of the two systems.
- (ii) Illustrations 1–5 under s 10 are equally applicable to the case of a male intestate governed by any of the two systems.
- (iii) Illustrations 1–3 under s 11 are equally applicable to the case of a male intestate governed by any of the two systems.
- (iv) Illustration under s 8 which relate only to the question of computation of degrees is equally applicable to the case of a male intestate governed by any of the two systems.
- (v) The heirs to be considered are *SSSS*, son's son's son's son; *SSSD*, sons's son's son's daughter; *DSSS*, daughter's son's son's son; and *DDDD*, daughter's daughter's daughter's daughter. Here *SSSS* and *SSSD* are agnates and *DSSS* and *DDDD* are cognates. But they all belong to the same category by operation of cl (c). They have no degrees of ascent and they all have five degrees of descent. They are, therefore entitled to succeed simultaneously. In practice, there is no likelihood of such descendants becoming competing heirs, but reference is made to them as they rank high up in the order of succession.
- (vi) The heirs to be considered are *FFM*, father's father's mother; *FFF*, father's father's father; *FMM*, father's mother's mother; *FMF*, father's mother's father; *MMM*, mother's mother's mother; *MMF*, mother's mother's father; *MFM*, mother's father's mother; *MFF* mother's father's father. Here *FFM* and *FFF* are ascendants who are agnates, and the rest are ascendants who are cognates. However, they all belong to the same category by operation of cl (c). They all have four degrees of ascent and no degrees of descent. They are, therefore, entitled to succeed simultaneously. The remark at the end of Illustration 5 above applies also to this illustration.
- (vii) The competing heirs are *BSS*, brother's son's son; *BSD*, brother's son's daughter; *BDD*, brother's daughter's daughter; *BDS* brother's daughter's son; *P* step brother's son's son; *Q*, step-brother's daughter's daughter; *MBS*, mother's brother's son; *MBD*, mother's brother's daughter; *MSis S*, mother's sister's son; and *MSis D*, mother's sister's daughter. Here *BSS*, *BSD*, *BDD*, *BDS*, *P* and *Q* have only two degrees of ascent and three degrees descent. Therefore, in computation of degrees, the others are entitled to be preferred to *MBS*, *MBD* *MSis S* and *MSis D*. But *BSS*, *BSD*, *BDD* and *BDS* are related to the intestate by full-blood, whereas *P* and *Q* are related to him by half-blood. Therefore, *BSS*, *BSD*, *BDD* and *BDS* are entitled to be preferred to all others. Each of them will take one-fourth share in the property of the intestate.

- (viii) The competing heirs are *BSS*, brother's son's son; *BDS*, brother's daughter's son; *UB*, uterine brother; and *US* is the uterine sister of the male intestate. Here *BSS* is an agnate and the others are cognates, but they all belong to the same category by operation in cl (c). Relationship in case of heirs other than those in Classes I and II of the Schedule includes relationship by uterine blood. *BSS* and *BDS* have two degrees of ascent and three degrees of descent. *UB* and *USis* have two degrees of ascent, but only one degree of descent and are, therefore, entitled to be preferred. In the above illustration if the competing heirs had (instead of *BSS* and *BSD*) been *BS* and *BD*, the brother's son and brother's daughter respectively and *UB* and *USis*, the uterine brother and uterine sister of the male intestate, the position would have been different. *BS* and *BD* would have been entitled to succeed to the property as heirs specified in Class II of the Schedule and excluded *UB* and *USis* who being cognates, are heirs only in the third category of cl (c).

SUCCESSION IN CASE OF FEMALE INTESTATE

Clause (ii) of the section propounds a definite scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act in case of persons who would have been governed by the *Marumakkattayam* or *Aliyasantana* law, if this Act had not been passed. The initial words of the section refer to ss 8, 10, 15 and 23 in so far as they relate to succession to a female intestate. Section 15 of the Act lays down general rules of succession in the case of female Hindus and the effect of cl (ii) to (iv) of the present section is to substitute cl (ii) for sub-s (1) of s 15 and omit cl (a) of sub-s (2) of that section and also to rule that s 23 which contains special provisions respecting dwelling-houses is not to apply in case of succession to the property of a person governed by any of the two system of law. The general rules of succession laid down in s 15 in their application to the case of succession to the property of a female intestate governed by any of the two systems may read as laid down in the Act:

(1) The property of a female Hindu hitherto governed by the *Marumakkattayam* law or *Aliyasantana* law, dying intestate (after the coming into operation of this Act) shall devolve according to the rules set out in section 16—

- (a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother;
- (b) secondly, upon the father and the husband;
- (c) thirdly, upon the heirs of the mother;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the husband.

(2) Notwithstanding anything contained in sub-section (1)—

any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of the any predeceased son or daughter), not upon the other heirs referred to in sub section (1) in the order specified therein, but upon the heirs of the husband.

It will be noticed that the scheme of succession laid down here is in many important respects materially different from that under s 15 of the Act. Reference may be made to the notes under s 15 bearing in mind the different scheme of succession propounded in this section.

The substituting cl (ii) groups the heirs of the female intestate into five categories described as Entries (a)–(e). The order of succession laid down in these Entries is not however, a complete statement of the law. An exception is engrafted on the same to the effect that in case the female intestate dies without leaving any issue (son, daughter, or children of any predeceased son or daughter), any property inherited by her from her husband or from her father-in-law, is to devolve not upon the other heirs mentioned in the Entries, in the order specified therein, but upon the heirs of the husband. Subject to this exception, the heritable property of a female intestate devolves upon her heirs enumerated in the five Entries. Among the heirs so specified those in Entry (a) are preferred to those in Entry (b); the heirs in Entry (b) are preferred to the heirs in Entry (c) and so on in case of succeeding Entries.²⁹ Therefore, it is only in case of failure of the heirs specified in Entry (a), but not until then, that the property will devolve upon the heirs listed in the next Entry and similarly in order of succession.

The effect of the rules laid down in this section in relation to the property of a female intestate may be summarised as follows:

- (1) The *general order of succession* laid down in the substituted Entries (a)–(e) applies in case of all property of a female intestate howsoever acquired, except in case of property inherited by her from her husband or father-in-law.
- (2) In case of a female intestate leaving a son or a daughter or a child of a predeceased son or of a predeceased daughter, that is leaving any issue all her property, howsoever acquired, devolves on such issue regardless of the source of acquisition of the property and such issue must take the property simultaneously, with her in accordance with the substituted Entry (a). In such case the exception does not at all come into operation.
- (3) In case of a female intestate dying without issue but leaving her mother, the mother will take all her property except:

²⁹ Section 16, r 1

- (a) property inherited by her from her husband or father-in-law which will revert to the heirs of the husband in existence at the time of her death: and
- (b) in case the female intestate had remarried after the death of her first husband the property inherited by her from him or his father (as the widow of a predeceased son) will revert to the heirs of the first husband in existence at the time of her death.
- (4) In case of a female intestate dying without issue, property inherited by her from her husband or father-in-law go to the heirs of the husband. In such a case the *terminus a quo* will be the husband as if the husband were the propositus and the ascertainment of the heirs will once again commence from the husband, and the order of succession will be in accordance with the substituted cll (a) to (c) relating to the estate of the male intestate.

ORDER OF SUCCESSION AND MANNER OF DISTRIBUTION AMONG HEIRS OF A FEMALE HINDU UNDER SECTION 17 READ WITH SECTION 15 AND 16

Clauses (ii) and (iii) of the present section have to be read with s 15 as already indicated. The substituted Entries (a) and (e) and the exception to the operation of the order specified in those Entries have to be read with s 16, which may be said to constitute the statute of distribution.³⁰ The following illustrations relate to succession to the property of a female intestate governed by any of the two matriarchal systems and the distribution shares or portions or the persons entitled to her property. Reference to the entries in the illustrations is to the substituted Entries.

Illustrations

- (i) *A* dies leaving surviving her *S*, her son; *SS1* and *DS1*, son and daughter respectively of *S1* her predeceased son; *D* and *D1*, her two daughters; *M* her mother; and *H* her husband. All the property of *A*, howsoever acquired, will devolve simultaneously upon *S*, *SS1*, *DS1*, *D*, *D1*, and *M* as heirs specified in Entry (a). *H* could have been an heir only under Entry (b) and is not entitled to succeed as there are heirs under Entry (a). The shares of *S*, *D*, *D1* and *M* will be one-fifth each. *SS1* and *DS1* will, between them, take only one share (*per stirpes*) i.e. they will get one-tenth each of the property by operation of r 2 of s 16.

³⁰ For instance see *Balkrishna Katmal v Gopala Katmal* ILR (1973) 149.

- (ii) *A* dies, leaving surviving her, adopted daughter *D* and her husband *H*. All the property of *A*, howsoever acquired, will devolve only upon *D*.
- (iii) *A* dies leaving her surviving *SH1* and *DH1*, her son and daughter by *H1*, her first husband and *DH2* a daughter by her second husband. *A* had inherited half of *H2*'s property on his death. All the property of *A* will devolve in equal shares upon *SH1*, *DH1* and *DH2* under Entry (a). Since *A* dies leaving issue the exception does not come into operation in this case.
- (iv) *A* dies leaving her surviving her father, her husband and her mother's brother. *A* had inherited considerable property from her mother. All the property of *A* will devolve upon her father and husband in equal shares under Entry (b). The mother's brother features only in Entry (c) and is therefore not entitled to any share.
- (v) *A* dies leaving her surviving *SSS*, the son of a predeceased son of a predeceased son; *SDS*, the son of a predeceased daughter of a predeceased son and *B* her brother. *SSS* and *SDS* are not heirs specified in Entries (a) or (b) or (c). *A*'s property will, therefore, devolve on *B* alone as the heir of *A*'s mother under Entry (c). If however, *A* had left any property inherited by her from her husband or father-in-law, such property will not devolve on *B*, but will devolve on the heirs of the husband. *SSS* and *SDS* will become entitled to the same in equal shares as the husband's heirs under Class I of the Schedule.
- (vi) *A* dies unmarried, leaving her surviving *FB*, her father's brother and *MB*, her mother's brother. The property left by *A* had been inherited by her from her father. It will devolve upon *MB* as the heir of her mother under Entry (c)—which will operate twice over, in preference to *FB*, who is only an heir mentioned in Entry (d).
- (vii) *A* dies unmarried, leaving surviving her *B*, her full brother; *C* her full sister and *UB* and *US* her uterine brother and uterine sister respectively (*A*'s mother having married again after the death of *A*'s father). All the property left by *A* will devolve upon *B*, *C*, *UB* and *US* as the heirs of her mother under Entry (c).
- (viii) *A* dies unmarried leaving her surviving *FBS*, father's son and three daughters of her father's sister. The property left by *A* will devolve upon *FBS* and the three daughters of her father's sister in equal shares as the heirs of her father under Entry (d). *FBS* and the three daughters of the father's sister are the father's heirs under cl (b) relating to succession to the property of a male intestate (heirs enumerated in Entry IV of Class II of the Schedule).
- (ix) *A* dies leaving her surviving *M* her mother; *F* her father; *P* her husband's father's brother's son and *Q*, her husband's mother's sister's daughter. *A* had inherited the property from her husband

and a part of it from her father-in-law. *A*'s property will not devolve upon *M* or *F*, but upon the heirs of her husband. *P* is her husband's agnate having three degrees of ascent and two degrees of descent and *Q* is her husband's cognate having three degrees of ascent and two degrees of decent. *A*'s property will be divided between *P* and *Q* in equal shares. This will be by operation of the exception and under the substituted cl (c) relating to agnates and cognates. In the above illustration if *P*'s father was not the full brother but step-brother of *A*'s husband's father, *P* would not have become entitled to a share in the property. The nature of relationship of *P* and *Q* with *A* is the same in every respect (by computation of degrees), but full-blood is to be preferred to half-blood (s 18).

GENERAL PROVISIONS RELATING TO SUCCESSION

18. Full-blood preferred to half-blood.—Heirs related to an intestate by full-blood shall be preferred to heirs related by half-blood, if the nature of the relationship is the same in every other respect.

Succession to the property of a Hindu is now governed by the provisions contained in Chapter II of this Act. Sections 5 to 17 are grouped under the heading 'General' and ss 18 to 28 under the heading 'General provisions relating to succession'. The rules laid down in ss 18 to 28 are supplementary to the provisions in ss 5 to 17. These rules are not merely explanatory, but some of them lay down substantive rules involving legal principles.

This section is a substantial reproduction of the rule of Hindu law whereby relations of the whole blood are preferred to those of the half-blood. The section lays down a rule of general applicability to heirs, male and female, alike. It must be noted that the applicability of this rule of preference is conditioned by the words 'if the nature of the relationship is the same in every other respect'. The words 'if the nature of relationship is the same in every other respect' may require judicial interpretation. It is plain that a full brother is preferred to a half-brother and a full sister is preferred to a half-sister; but doubt may perhaps be raised as to whether the nature of the relationship with the intestate of his brother and sister enumerated in entry II of Class II of the Schedule can be said to be the same in every respect, and a full brother would be preferred to a half-sister or a full sister would be preferred to a half-brother and the same doubt may be raised in other cases where the competing heirs are similarly related to the intestate. The rules of preference applicable to agnates and cognates of a male intestate emphasize that the nearness of relationship recognised under the Act depends in their case on the number of degrees of ascent or descent or both of ascent and descent and the same doubt may perhaps be raised in case of

some of those relatives. The section speaks of the nature of relationship being the same and it would seem that in all such cases heirs related to an intestate by full blood would be preferred to heirs related by half-blood having regard inter alia, to the nature of relationship indicated in the scheme of the Act itself. The meaning of the words 'nature of relationship' must be found in the sense in which they best harmonise with the scheme and object of the Act and not so much in a strictly etymological propriety of language. The general scheme of succession under the Act is to treat the son and the daughter in *equali jura* and to regulate the order of succession with regard to the degree of kindred to him. It is therefore, submitted that since a brother and a sister of the intestate stand in the same degree of relation to him, the nature of their relationship with the intestate is the same in every other respect.³¹ The same considerations apply to cases under Entries IV, VI, VII and IX in Class II of the Schedule and where the competing heirs are agnates or cognates and relationship is by full-blood and half-blood (see illustrations below).

The rule laid down in the section applies only when the nature of relationship is the same according to every relevant mode or manner affecting its nature and the rules of preference laid down in the Act for determination of the order of succession. It cannot, therefore, be evoked when a particular heir is preferred to another by operation of any such rule regulating the order of succession. Thus, for instance it has no application where the competing heirs are a full-brother's son and a half-brother or a half-sister of a male intestate. The full brother's son is not related to the intestate equally with them in every respect. He is an heir under Entry III of Class II of the Schedule, while the half-brother and half-sister are heirs specified in Entry II and therefore entitled to be preferred irrespective of their being related to the intestate by half-blood.

Illustrations

- (i) *P*, a male intestate dies leaving surviving him *A*, a full-sister's daughter and *B*, a half-brother's son. Brother's son and sister's daughter are both heirs specified in Entry IV of Class II of the Schedule. The nature of their relationship with the intestate is the same and the full sister's daughter will be preferred to the half-brother's son.

³¹ Quoted with approval in *Yellauva Gounder v Lakshmi* AIR 1975 Mad 253; *Sarwan Singh v Dhan Kaur* AIR 1971 P&H 323 (full-sisters preferred to step-brothers). The High Court of Bombay took the contrary view in *Purshottam v Shripad* AIR 1976 Bom 375, this decision has been overruled by a Full Bench decision of the Bombay High Court in *Waman Govind v Gopal Baburao* AIR 1984 Bom 208 (F.B). *Narayanan v Pushparajni* AIR 1991 Ker 10 (succession to property of person having no wife or children—brother by half-blood excluded in favour of sister by full-blood). *Jhugh Tekam v Asst. Commr* AIR 2004 MP 52 (sister by full blood preferred to step brothers and sisters).

- (ii) *P*, a male intestate dies leaving surviving him *A*, his father's half-brother; *B* his father's sister; *C*, his father's full brother's son; and *D*, his mother's full-brother. *A* and *B* are heirs specified in Entry VII of Class II of the Schedule, *D* is an heir under Entry IX and *C* is only an agnate. *C* and *D* are excluded as remote heirs. The relationship of *A* and *B* with the intestate is the same in every respect except that *B* is related to him by full-blood and *A* by half-blood. *B* will be preferred to *A*, and inherit the whole of *P*'s property.
- (iii) *P*, a male intestate dies leaving surviving him *A*, his mother's half-brother; *B*, his mother's half-sister; and *C*, his mother's full-brother's son. *C* is excluded as a remote heir. The relationship of *A* and *B* with the intestate is the same in every respect and both are specified as heirs under entry IX of Class II of the Schedule. They are both related to the intestate by half-blood and not entitled to any preference inter se, and will take *P*'s property in equal shares.
- (iv) The competing heirs of *P* a male intestate are *A*, the son of his father's half-brother; and *B*, the daughter of his father's full-brother. They are both agnates of *P* and the nature of their relationship with him is the same. *B* is related to *P* by full-blood and will be preferred to *A*.
- (v) The competing heirs of *P* a male intestate are *A*, the son's of his father's full brother; and *B*, the daughter of his father's half-brother. *A* and *B* are both collateral agnates. Both the claimants have three degrees of ascent, but *A* has three degrees of descent and *B* has only two degrees of descent, with the result that she is preferred to *A* although she is related to *P* by half-blood and *A* is related to *P* by full-blood. The nature of relationship of *A* and *B* with *P* is not the same in every respect.
- (vi) The competing heirs of *P*, a male intestate, are *A*, his mother's full brother's son; and *B* his mother's half sister's son. *A* and *B* are both collateral cognates. Both the claimants have three degrees of ascent and two degrees of descent. The nature of their relationship with *P* is the same. *A* is related to *P* by full-blood and will be preferred to *B*.
- (vii) *P*, a female intestate dies leaving her surviving *A*, her husband's half-brother; *B*, her husband's full sister; and *M*, her mother. All the property of *P*, except any property that she might have inherited from her father, will devolve upon the heirs of *P*'s husband under Entry (b) of s 15(1) as if such property had been the husband's and the husband had died intestate in respect thereof immediately after *P*'s death. *B* as the full sister of *P*'s husband will inherit such property in preference to *A*.
- (viii) *P*, a female intestate dies leaving her surviving *H*, her husband; *B* her full-brother; and *C*, *D* and *E*, her step-sisters; her father *F* having

remarried after the death of *M*, her mother. On the death of *M*, her property had devolved on *B*, *P* and *F*. All the property left by *P* had been inherited by her from her mother. Under s 15(2)(a) her property will not devolve upon her husband, but will devolve upon the heirs of her father. The heirs of the father being *B*, *C*, *D* and *E*, it may possibly be contended that they should in any such case inherit *P*'s property in equal shares. The rule about full-blood being preferred to half-blood is, however, of general application and the purpose of ascertaining the heirs of the father is really to determine the heirs of the intestate. Ultimately, therefore, the rule of relationship by full-blood being preferred to half-blood must operate and *B*, her full brother, will be preferred to the step-sisters.³²

19. Mode of succession of two or more heirs.—If two or more heirs succeed together of the property of an intestate, they shall take the property,—

- (a) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and
- (b) as tenants-in-common and not as joint tenants.

The section also is a substantial reproduction of the rule of Hindu law, whereby subject to limited exceptions persons of the same relationship to the intestate take *per capita*, that is, the estate is divided into as many shares as the number of heirs, each taking one share. The section lays down the general rule of distribution that two or more heirs of a male or female intestate who succeed together under the Act take property *per capita* and as tenants-in-common and on *per stirpes* unless there is an express provision to the contrary.

In case, distribution of an intestate's estate takes place *per capita*, each claimant has a share in his or her own right as in equal relationship declared to exist by any specific provision or equal degree of kinship established by reckoning degrees of ascent or descent or both. Thus for instance distribution among the four heirs of a male intestate mentioned in Entry II of Class II of the Schedule, namely, son's daughter's son, son's daughter's daughter, brother and sister is *per capita*. They all succeed together and each has an equal share in his or her own right as an heir claiming relationship *in equali jura* declared to exist by one specific Entry. There is no express provision to the contrary in the Act applicable to heirs enumerated in any particular Entry in Class II and s 11 enacts that heirs specified in any one Entry in that

³² This illustration came up for consideration in *Rangamma v Annapurnamma* AIR 1963 Mys 168. Reference may be made to Illust 3 under notes on sub-s (2) cl (a) of s 15 *ante* which has now been modified.

class share equally. In distribution *per stirpes* the claimant gets a share as representing another person. Thus for instance in case of distribution of property of a male intestate among his heirs in Class I of the Schedule, while the surviving sons and daughters and the mother of the intestate are each entitled to take one share, that is per capita the heirs in the branch of a predeceased son or a predeceased daughter takes between them one share as expressly laid down in s 10, r 3. In case of the latter, distribution is *per stirpes* and on the principle of representation.

Instances of exceptions to the general rule about distribution per capita are expressly provided in rr 1, 3 and 4 of s 10, r 2 of s 16, by operation of sub-s (2) of s 1; hereunder the property of a female intestate devolves in certain cases on the heirs of the father or husband of the intestate; and under the proviso to s 6 which brings about the operation of rr 1, 3 and 4 of s 10 in the case of a male Hindu who dies leaving any heirs mentioned in the proviso to s 6 and having at the time of his death an interest in a Mitakshara coparcenary.

TENANTS-IN-COMMON

Heirs who succeed together to the property of an intestate as envisaged in this section and the earlier relevant provisions of the Act are obviously entitled to all the rights and subject to all obligations to persons who are tenants-in-common. In a tenancy-in-common, each sharer has an independent share in the common property and ordinarily cannot act for the others or assume the authority of a manager unless so appointed by all the others. Thus for instance one of several female heirs who are co-tenants cannot alienate the property held as co-tenants though, or course, in a given case the Court may as far as possible try to protect the interest of the alienee on equitable considerations.³³ A co-owner, as such, it has been held in the context of the present section, has no authority to enlarge the period of limitation as against the other co-owners, by any acknowledgment of liability or payment of interest or principal.³⁴

20. Right of child in womb.—A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the death of the intestate.

³³ *Thrimalaisvami Gounder v Parvathammal* AIR 1977 Mad 40; AIR 1977 Mad 38; *Ajit Kumar v Satya Bala* 1978 CWN 19 (monthly tenancy is property under this section: heirs of a sole tenant inherit the tenancy as tenants-in-common).

³⁴ *Parasuraman v Purushothaman and Co* AIR 1977 Ker 132.

It is by fiction or indulgence of the law that the rights of a child born in *justo matrimonio* are regarded by reference to the moment of conception and not of birth and the unborn child in the womb, if born alive, is treated as actually born for the purpose of conferring on him benefits of inheritance. The child in embryo is treated as in *esse* for various purposes when it is for his benefit to be so treated. This view is not peculiar to the ancient Hindu law but one, which is adopted by all mature systems of jurisprudence. This section recognises that rule of beneficent indulgence and the child in *utero*, although subsequently born, is to be deemed to be born before the death of the intestate and inheritance is to be deemed to vest in the child with effect from the date of the death of the intestate.

The section is worded in sufficient amplitude and applies not only to cases where under the Act the heir, male or female, in order to become entitled to succeed to the intestate must be born of *justum matrimonium*, but also to those cases where an illegitimate child is entitled to claim relationship and inheritance by virtue of the proviso to s 3(1)(j). The rule will also apply to the case of children of a void or voidable marriage who are within the purview of s 16 of the Hindu Marriage Act 1955. That section in terms speaks of children in the womb of their mother. The operation of that section is, however, limited as pointed out in the notes under that section. Reference is invited to notes under s 16 of that Act.

It is required that the child in the womb must be born alive. In any such case, although the general law is that succession is never in abeyance, the legal fiction comes into operation and the child takes the inheritance or his or her share of the inheritance and since the inheritance is deemed to vest from the date of the death of the intestate, the necessary consequence is to divest wholly or partially the property which might have vested in any other person or persons as heirs of the intestate. The alienation of any property from any such heir is also affected by the rule. Such divesting of property will occur in the case of all the different modes of succession laid down in ss 6, 8, 15 and 17. A natural corollary of the rule relating to vesting recognised in this section is that in case of the death of the child at any time after birth, the inheritance devolving on the child will go by succession to the heirs of the child.

21. Presumption in cases of simultaneous deaths.—Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

PRESUMPTION IN CASES OF SIMULTANEOUS DEATHS

The question whether any artificial presumption should be invoked or not has not been free from difficulty when disputes have arisen about continuance of life and time of death in case of persons, often members of the same family, perishing in a common calamity in circumstances rendering it uncertain which of them survived the other or others, and the rights of third parties are affected. Allowing the question to be determined by ordinary rules of burden of proof in any such case can hardly be said to have given satisfactory results and, if anything, has been an inducement to excessive subtleties reprobated in law. Death may or may not have been simultaneous in case of catastrophes such as shipwreck, earthquake, explosion, conflagration, railway or flying accident, bombing and the like. The section is intended to apply to such cases and lays down a rule of artificial presumption, when question arises as to the priority in point of time of the death of any such person or persons termed *commorientes* in the Roman law.

The section follows the rule now enacted in England in the Law of Property Act 1925, s 184: 'In all cases where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such death shall, subject to any order of the court, for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder'. That section has been considered by courts in England and it has been held that the words 'subject to any order of the court' mean that the presumption is to prevail unless there is evidence leading to a defined and warranted conclusion that one died before the other.³⁵ The same is the effect of the words 'until the contrary is proved' which find place in the present section. The statutory presumption may be rebutted by evidence beyond doubt that each died at precisely the same moment of time or that the elder had in fact survived the younger. The Court will not, however, exclude the presumption in favour of the survival of the younger unless there is evidence leading to a defined and warranted conclusion to the contrary.

The section applies both in case of testamentary and intestate succession and in case of *commorientes* governed by the present Act, it would operate as an important proviso to s 105(2) of the Indian Succession Act and the Illustration (vi) to that section would have no bearing.³⁶ It has been observed that the section has retrospective effect, as the law of evidence is a law of procedure.³⁷

³⁵ *Hickman v Peacy* [1945] AC 304; *Chillingworth v Bate* [1947] 2 All ER 418; *Lee Barber v Reynolds* [1942] 2 All ER 46; *Madambath v Devi* AIR 2002 Ker 192 (section inapplicable as date of death of one brother was known).

³⁶ *Jayanulal v Chhanalal* AIR 1968 Guj 212; *Re Mahabir Singh* AIR 1963 Punj 66.

³⁷ *Re Mahabir Singh* AIR 1963 Punj 66 (husband and wife—wife legatee).

M and her daughter *K* died in a fire and on consideration of evidence the conclusion was reached that they had perished in circumstances rendering it uncertain whether either of them had survived. Applying the rule of presumption laid down in this section, it was held that *K* the daughter had survived her mother. Prior to her death *M* had executed a will and left her property to *K* as a legatee and the property devolved on the heirs of *K*.

A defendant in a partition suit was murdered at night along with her foster daughter in whose favour the defendant had bequeathed her property by will. It was uncertain as to who died first. The heirs of the foster daughter were directed to be brought on the record of the partition suit in preference to the sons of the defendant who claimed to be the heirs of the latter on basis of intestacy.³⁸

22. Preferential right to acquire property in certain cases.—(1)

Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section, ‘court’ means the court within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

PRE-EMPTION

This section appears to have been thought necessary as an antidote to the inconvenient effects sometimes resulting from transfer to an outsider by a

³⁸ *Setty v Gyanchandrappa* AIR 1970 Mys 87.

co-heir of his or her interest in property simultaneously inherited along with other co-heirs. The right declared by the section is analogous to the right of pre-emption which tends to raise clogs and fetters on the full sale and purchase of property and is in general regarded as opposed to equity and good conscience. Even when recognised, it requires to be encompassed by rigid rules and limits lest the right should be exercised vexatiously. The note of the Joint Committee says that it would be just and proper to provide that in case any heir desires to transfer his or her interest in the property inherited under the provisions of this Act, the right of pre-emption should be given to others. The preferential right to acquire property under the section is confined only to cases of devolution of property upon two or more heirs specified in Class I of the Schedule.

The section does not apply where the property devolves by survivorship. The scope and applicability of this section is only restricted to cases of inheritance only.³⁹ The section does not apply where the transfer has been actually concluded but applies only to a proposed transfer.⁴⁰ In the former case, a regular suit may have to be instituted.⁴¹ However, in the case of a proposed transfer, an application can be filed in a partition suit.⁴²

The section does not include interest in agricultural land of an intestate.⁴³

The section requires more explicit and stringent language. It does not say how and when the right of preference is to be exercised. It is loosely worded and the expression 'transfer' itself is likely to create some difficulty. It could not have been intended to apply, for instance, to transfer of interest by way of mortgage. Probably the operation of the rule was meant to apply to an out and out sale of the interest or a gift of the same to an outsider. Sub-section (2) would seem to indicate such intention. Moreover, there is the danger of subtle devices being resorted to for defeating the object underlying the section.

A claim under this provision cannot be sustained if it is found that the property, which is proposed to be transferred, is capable of being partitioned.⁴⁴

The effect of the section may be thus summarised:

- (1) In case any heir specified in Class I of the Schedule desires to dispose off his interest in the property (immovable property or interest in a business) inherited by him simultaneously with any other heir or heirs of an intestate under the provisions of the Act, the latter have a preferential right to acquire that interest by purchase.
- (2) If the parties are unable to agree as to the quantum of consideration payable by the heir or heirs who intend to exercise the right conferred by sub-s (1), the price will be determined by the court

³⁹ *Bhola Nath v Santosh Prakash* AIR 1975 AP 336.

⁴⁰ *Krishnapad Roy v Parimal Chandra Saha* AIR 2000 Gau 117.

⁴¹ *Ghavrevala v Hanuman Prasad* AIR 1981 MP 250.

⁴² *Dwijabrata Das v Debabrata Das* AIR 1994 Gau 88.

⁴³ *Jeevanram v Lachmidevi* AIR 1981 Raj 16.

⁴⁴ *Dwijabrata Das v Debabrata Das* AIR 1994 Gau 88.

in an application made for the purpose. The intending purchaser is not, however, bound to pay the price fixed by the Court. If he does not choose to pay the same, he will only be liable to pay costs of the application.

- (3) In case of two or more heirs seeking to exercise the right conferred by sub-s (1) that heir who offers the highest consideration must be preferred and allowed to acquire the interest.

SUIT

Where in a case envisaged by this section any property is already transferred by co-heir the remedy of the other co-heirs to enforce their pre-emptive right would be by a regular suit and not by way of an application under this section.⁴⁵ The High Court of Patna has however, taken the view that an application is maintainable and there is no necessity of filing a suit.⁴⁶

Transfer not void but voidable.—The alienation envisaged in the section is not void but voidable.

SUB-SECTION (1)

It does not apply to all categories of heirs who succeed simultaneously to the property of an intestate, but its operation is confined to cases where the property referred to in the section devolves upon two or more heirs specified in Class I of the Schedule. The intestate may be a male or a female. The sub-s applies to any immovable property of an intestate, as also the interest of the intestate in any business carried on by him or her alone or in conjunction with others. The business includes business carried on by the intestate in partnership with others. It may be noted that rights of the other partners or the incidents of partnership are not intended to be affected by the rule.

The preferential right to acquire the property cannot, however be exercised by an heir who has relinquished his rights in the property in favour of other heirs.⁴⁷

LIMITATION

It has been held in the undermentioned case that art 97 of the Limitation Act applies to an application under this section.⁴⁸

⁴⁵ *Shree Dera v Subhadra* AIR 1976 Ker 19, *Tarak Das v Sunil Kumar* AIR 1980 Cal 53, *Muralidhar v Bansidhar* AIR 1986 Ori 119, *Bhagnathi Chator v Adikanda* AIR 1988 Ori 285; *T Srinivasamurthy v P Leelavathy* AIR 2000 Mad 516.

⁴⁶ *Gopal Prasad v Bansidhar Singh* AIR 2000 Pat 240 (differing from AIR 1976 Kerala 19 supra; *Kamal Goel v Purushottamdas* AIR 1999 P&H 254).

⁴⁷ *Karunakar Rout v Golak Biswal* AIR 1995 Ori 110.

⁴⁸ *Tarak Das v Sunil Kumar* AIR 1980 Cal 53.

APPEAL

An order under this section is not a decree and is not appealable as such.

SUB-SECTION (2)

It deals with the question of quantum of consideration to be paid by the other heirs or heir who claim the preferential right to acquire the interest proposed to be transferred by a co-heir. If the parties are unable to agree as to the price, an application can be made to the court and the court will assess the price that should be paid by the intending purchaser or purchasers. If the intending purchaser is not willing to pay the amount at which the interest is valued by the court he cannot be compelled to do so unless he has actually agreed to pay the price that may be determined by the court. However, in such a case he will have to pay the costs of the application. The court will fix the fair value of the interest after taking into consideration all relevant facts and evidence as to price and the highest amount that any one of the parties may be willing to pay.

SUB-SECTION (3)

It lays down in effect that where there are two or more heirs willing to acquire any interest under this section for the consideration determined by the court, the one who offers the highest amount will be preferred.

23. Omitted by Hindu Succession (Amendment) Act 2005.

The reason for such deletion is to remove the disability faced by a female heir in claiming her share in the property, as the section disentitled the female heir from claiming a partition of such property belonging to a joint Hindu family. The disability is now removed, paving way for such female to claim a partition of the dwelling house, more particularly by substitution of s 6, whereby the female heir has the same rights and liabilities as a male coparcener.

Section 23 previously read as follows:

23. Special provisions respecting dwelling houses.—Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

SPECIAL PROVISIONS RESPECTING DWELLING HOUSES

The object and importance of the rule here enacted is easily discernible. One objection raised against the right of a female to be recognised as an unqualified heir and to an equitable distribution of the property of a Hindu who dies intestate was, that in many cases the property may consist substantially of the family dwelling-house and the allotment of a share to a daughter and particularly a married daughter in such a case would be fraught with serious consequences to the sons of the intestate. The note of the Joint Committee says that this section restricts the right of a female heir to claim partition of the family dwelling-house so long as the male heirs do not choose to effect partition of the same, but it expressly recognises her right to reside in such a house. The proviso to the section was added at a later stage of legislation.

The Calcutta High Court has taken the view that this section cannot have retrospective operation and does not apply to the case of an intestate who died before the commencement of the Act.⁴⁹

It is rather unfortunate that the rule enacted in this section, which must necessarily apply even to small and modest family dwelling-houses in towns and villages, should not have been more clearly stated. The rule is a statutory novelty and obviously required careful particularity of language. The section is not very lucid as it stands. The expression 'members of his or her family' used in describing the occupants of the family dwelling-house is likely to raise some doubtful points. Some other difficulties of interpretation, likely to arise, are mentioned in the notes, which follow.

Partition is a necessary incident of the tenancy-in-common declared by the Act generally to exist in case of all heirs male and female who succeed at the same time. The section is intended to ensure easement of disruptive influences, which would operate, if the right of a female heir to claim partition of the family dwelling-house were left unrestricted. The restriction imposed by the section is applicable where the intestate or female is survived by male and female heirs enumerated in Class I of the Schedule and not where the intestate is survived only by heirs in Class II of the Schedule or by agnates or cognates. The restriction is confined to the right of any of the female heirs where there are other male heirs enumerated in Class I and does not apply to a case where the heirs in that class are only males or only females. The restriction, it will be observed, does not affect in any manner the devolution of the family dwelling-house upon all the heirs including female heirs of the intestate; nor does it affect the right of any such female heir to transfer her interest in it, subject to the provisions

⁴⁹ *Upendra Nath v Chintamani Devi* AIR 1963 Cal 22, that view has been dissented from in *Mallikarjun Rao v Siva Sankara Prasad* AIR 1981 AP 84.

of s 22. The restriction also does not affect the right of a son of a predeceased daughter (who is one of the heirs specified in Class I of the Schedule) to claim partition of the dwelling-house. The restriction is strictly confined to the right of such female heir to ask for partition of the family dwelling-house and operates only:

- (1) if the family dwelling-house is occupied by the members of the family of the male or female intestate; and
- (2) until the male heirs choose to divide their shares in it.

The dis-entitlement of a female to seek a partition of the dwelling house, cannot by implication mean that such female can sue for partition of other properties.⁵⁰

As the daughter is an heir to the property of the intestate including the dwelling-house, she would be a necessary party to a suit or appeal relating to the dwelling-house and non-impleading of her would result in abatement.⁵¹

‘SURVIVING... HER... HEIRS SPECIFIED IN CLASS I OF THE SCHEDULE’

The word heirs specified in Class I of the Schedule are used in a descriptive sense and the reference to the heirs in Class I of the Schedule is to economise on words. In case of a female intestate, her male heirs, therefore, who may prevent partition of the family dwelling-house can only be her son, son's son, son's son's son and daughter's son and not her husband. It must follow that if a female intestate dies leaving surviving her, her husband, a married daughter and other daughters who are unmarried, the married daughter can enforce partition of the family dwelling-house, although it is wholly occupied by members of the family. In such a case, however, if the intestate had also left sons of a predeceased daughter, the married daughter will not be entitled to insist on partition until the latter choose to divide their respective shares in the dwelling-house and even though the daughter's sons were not living with the family. The husband of the intestate may in such a case enforce his own independent right to partition as an heir of the intestate under s 15 but he may not be willing to do so. Some anomalous situations, as already mentioned, are likely to arise from the language of the section.

In *Arun Kumar v Jnanendra*,⁵² it has been held that a transferee of a female heir is not entitled to partition of the dwelling-house on the ground that the bar imposed by the section is not a personal bar. The object of the section is clearly to prevent fragmentation and disintegration of such house

50 *Sitaben v Bhanabhai* AIR 2002 Guj 376.

51 *Raghunandan v Rambalak* AIR 1964 AP 206.

52 *Arun Kumar v Jnanendra* AIR 1975 Cal 232; *Surjya Kamal v Maya Dutta* AIR 1982 Cal 222; *Janabai Ammal v TAS Palani Mudalier* AIR 1981 Mad 62.

at the instance of a female heir and also to avoid the hardship that may be caused to the male heirs or heir. In *Hemalata v Umasankari*,⁵³ it has been held that where there is a single male heir the right to claim partition of the dwelling-house by any female heir is not excluded. In *Arun Kumar v Jnanendra* (supra), a different view has been expressed on this aspect. In a case decided by a Full Bench of the Orissa High Court, the court dissented from the views expressed in the Calcutta and Madras cases, and approving the earlier decision of the Orissa High Court held that the daughter is entitled to claim partition when property is inherited by a single male heir.⁵⁴ Instances can readily be visualised where either view can result in hardship. As pointed out above, the section requires to be stated more clearly to give effect to the intention and object of the legislature and remove some serious doubts, which must necessarily arise in such cases.

The High Court of Madras has held that the inhibition engrafted into the section is not absolute and cannot apply when there are more than one dwelling house properties.⁵⁵

‘DWELLING-HOUSE WHOLLY OCCUPIED BY MEMBERS OF HIS OR HER FAMILY’

The expression dwelling-house is not defined in the Act. However, the context shows that the reference is to the dwelling-house which in the colloquial sense the intestate normally occupied by the members of his or her family and regarded as his or her abode of permanent residence and which upon his or her death the members of the family can be said to have continued to occupy. Occupation by the members of the family does not necessarily mean actual residence or continuous residence in the house; nor does it mean that the members must be residing in the house. In practice much difficulty need not arise because the linguistic equivalent of the expression family house used in ordinary parlance in various parts of the country will be a pointer to the dwelling-house respecting which special provision is made in this section and if any problem arises it will have to be solved in a commonsense way. Whether a particular house can be regarded as the dwelling-house contemplated by the section or not, will also depend on the facts and circumstances of the particular case. The house must be wholly occupied by the members of the family and the restriction on the right to claim partition will not operate for instance where it is only partly occupied and partly or substantially let out to tenants. The occupation contemplated by the section is of members of the family of the intestate. It may not, however, be easy to say who are to be regarded as members

⁵³ *Hemalata v Umasankari* AIR 1975 Ori 208, *Anant v Jankibai* AIR 1984 Bom 319.

⁵⁴ *Mahanti v Oluru* AIR 1993 Ori 36 (FB).

⁵⁵ *R Deivanai Ammal v G Meenakshi Ammal* AIR 2004 Mad 529.

of the family of the male or female intestate and particularly of the latter. It seems doubtful whether any hard and fast rule will be laid down. Here also, any difficulty that may arise will have to be resolved in a commonsense way, having regard to the facts and circumstances of the case. In any case, the inhibition laid down in this section cannot apply if the house is partly occupied by a tenant.⁵⁶ Once a right to seek partition of a tenanted property has accrued, it cannot be extinguished if the tenant vacates the portion of the house which was in his occupation.⁵⁷

There is nothing to prevent a married sister from making a gift of her share to one of the brothers and in such a case the brother can ask for partition. He can claim his own share and the share gifted to him.⁵⁸

‘UNTIL THE MALE HEIRS CHOOSE TO DIVIDE THEIR RESPECTIVE SHARES THEREIN’

The right of a female heir specified in Class I of the Schedule to demand actual partition of the family dwelling-house is deferred and kept in abeyance until the male heirs specified in Class I decide to partition it, that is to divide it by metes and bounds, or realise its sale proceeds. Reference may be made to the undermentioned decision of the Allahabad High Court where agreement has been expressed with these views.⁵⁹ The question may perhaps arise whether the special restriction enacted in this section on the right of a female heir to demand actual partition of the family dwelling-house applies, when there is only one male heir of the intestate under Class I of the Schedule. The words ‘until the male heirs choose to divide their respective shares therein’ may suggest that there must be at least two such male heirs if the restriction is to operate. The object of the special provision is to prevent female heirs and, particularly a daughter of the intestate, from creating a situation in which partition of the family house may entail a forced sale of it or otherwise cause hardship to the son or sons of the intestate where it may not be possible for the son or sons to buy off the share of the female heir who insists on actual partition of it. It is submitted that there is nothing repugnant in the subject or context to prevent the operation of the rule laid down in s 13(2) of the General Clauses Act to the effect, that the plural shall include the singular and the restriction will apply even where there is only one male heir who does not choose to divide his respective share in the dwelling-house. It would seem that the right of a female heir to demand partition may be deferred and remain in abeyance

56 *Vanitaben v Divabben* (1979) 20 Guj LR 148, reference may also be made to *Usha v Smriti* AIR 1988 Cal 115; *Vidyaben v JN Bhatt* AIR 1974 Guj 23; (conflicting views have been expressed as to the meaning of ‘wholly’ in the section).

57 *Kamal Mazumdar v Usha Chaudhury* AIR 2004 Cal 185.

58 *SK Mondal v AK Mondal* 1982 CWN 961.

59 *Purnabasi v Supha Devi* AIR 1986 All 139.

under this section till the lifetime of the male heirs enumerated in Class I of the Schedule or the last survivor of them, unless a partition of the dwelling-house is sought by any one of them before such time. The restriction will cease to operate on the death of the last of such male heirs of the intestate or where there are only one male heir and one female heir and the male heir chooses to sell his moiety in the dwelling-house.⁶⁰

There was, as can be seen, a controversy between various High Courts as regards the effects of this section. The Supreme Court, recently interpreting the section, has held that the right of a female heir to claim partition of a dwelling-house remains in abeyance during the lifetime of the male heir or till such time that such male heir chooses to partition the property as also until such time that the male heir ceases to occupy it or lets it out.⁶¹ It is thus clear that the right of the female heir is suspended till any of the above enumerated events occur and fructifies only on any of the eventualities happening. The views expressed by the High Courts of Calcutta, Madras and Allahabad are correct and those of the Bombay, Gujarat, Orissa and Karnataka High Courts are erroneous.⁶²

The proviso to the section makes it very clear that an unmarried daughter can claim a right of residence in the family dwelling, so also a married daughter can also claim a right of residence, under certain circumstances.⁶³

24. Omitted by the Hindu Succession (Amendment) Act 2005. With the deletion of the section, the disability in inheriting the property of the intestate by succession, by specified widow has been removed and such specified widow can now succeed to the property of the intestate, even if she has remarried on the date that the succession opens.

The deleted s 24 read as follows:

24. Certain widows re-marrying may not inherit as widows.—Any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried.

60 *Mookkammal v Chitravadevammal* AIR 1980 Mad 243.

61 *Narasimha Murthi v Susheelabai* AIR 1996 SC 1826.

62 *Arun Kumar v Jnanendra* AIR 1975 Cal 232; *Surya Kamal v Maya Datta* AIR 1982 Cal 222; *Janabai Ammal v TAS Palani Mudaliar* AIR 1981 Mad 62; *Purnabasi v Supha Devi* AIR 1986 All 139 (correct view); *Anant v Jankibai* AIR 1984 Bom 319; *Vanitaben v Divaben* (1979) 20 Guj LR 148; *Hemalata v Umasankari* AIR 1975 Ori 208; *Karivva v Hanumantappa* (1984) 1 Kar LJ 273 (incorrect view). Also see *Bagarshettar v Pattanshetti* AIR 1988 Kant 174 and *Mahanti v Orolu* AIR 1993 Ori (FB). *Gomathi Ammal v P Muthukrishnan* AIR 2000 NOC 51 (Mad).

63 *Kalamma v Veeramma* AIR 1992 Kant 362 (daughter deserting husband not entitled to right of residence); *Thimmaraju v Puttachenchiamma* AIR 1990 Kant 317; *Sripathanath Neogi v Ira Ramisai* AIR 1992 Cal 60 (sister separated from husband has a right of residence); *Mahendra Mahanta v Tarini Devi* AIR 2003 Ori 180.

DISQUALIFIED HEIRS

Sections 24 to 28 deal with the question of disqualification of heirs. Section 28 lays down that no person shall be disqualified from succeeding to any property on any ground whatsoever, excepts on those expressly mentioned in the Act, namely, remarriage in cases falling under s 24; murder in cases falling under s 25; and conversion in cases falling under s 26. Section 27 lays down a general rule. Succession in any case, where there is a disqualified heir, takes place as if such person had died before the intestate.

The section deals with one of the grounds for disqualification, namely, remarriage, but the disqualification is confined only to certain heirs. It will be noticed that remarriage is not a disqualification in case of every female relative of the intestate. It is confined to the case of the three female heirs mentioned in this section and who are entitled to succeed under the Act as widows of relatives of the intestate. The step-mother does succeed as the widow of the father but the disqualification does not reach her. The mother of the intestate does not succeed as a widow of the father but in her own right,⁶⁴ and in case of the widow of the intestate there can be no question of any remarriage before the succession opens.

The section has no retrospective operation.

‘RELATED TO THE INTESTATE AS THE WIDOW OF A PREDECEASED SON’

The section applies to certain heirs of a male as well as female intestate. In case of a female intestate, the heirs of her husband and the heirs of her father can succeed to her property under sub-cl (b) and (d) of s 15(1) and the question of the application of this section can arise. The section in its application to heirs of a female intestate reads: ‘related to an intestate as the widow of a predeceased son...’, it does not say that the person disqualified must be related to an intestate as the widow of her predeceased son, etc. Thus, for instance, the widow of a predeceased son of her husband by another wife, who may, otherwise, become entitled to succeed to the property of the female intestate, may have remarried before the succession opens. The disqualification enacted in this section, it would seem, covers the case of any widow who claims to succeed as—the widow of the predeceased son; or the widow of a predeceased son of a predeceased son; or the widow of a brother of the husband or father of the female intestate under sub-cl (b) and (d) of s 15(1); or by operation of the provisions of s 15(2) or under s 17.

⁶⁴ *Montorabai v Paretanbai* AIR 1972 MP 145.

‘...AS SUCH WIDOW’

The disqualification laid down in the section applies only when the heir who is a widow claims to succeed on the ground that she is the widow of a predeceased son, or widow of a predeceased son of a predeceased son or widow of a brother and not where the same heir claims to succeed on the ground and any other relationship with the intestate.

‘...IF ON THE DATE THE SUCCESSION OPENS, SHE HAS REMARRIED’

The words if on the date the succession opens make it clear that the disqualification does not apply where the widow remarries after the succession has opened. In such a case there can be no divesting of the property which becomes vested in her immediately after the succession opens. It is not necessary however, for the application of the section that the subsequent marriage should be subsisting or that the husband by the subsequent marriage should be alive at the time the succession opens. Even if the subsequent husband has died or she has been divorced before that time, her case will be covered by the section. The reason is that a widow succeeds as the surviving half of her husband, and she ceases to be so by remarriage.

25. Murderer disqualified.—A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

MURDERER DISQUALIFIED

The doctrinaire theory that provisions of a statute of distribution are paramount and forbid the consideration of any disqualification not contained in the statute itself, was discountenanced by the Judicial Committee of the Privy Council in *Kenchava v Girimallappa*,⁶⁵ where it was observed that statutes regulating heirship or descent, or giving force to will should be read as not intended to affect paramount questions of public policy or depart from well-settled principles of jurisprudence. It was held that: (a) a murderer is disqualified from inheriting any interest in the property of the person murdered; and (b) that the murderer in such a case should be treated as non-existent and not as one who forms the stock for a fresh line of descent. In this section which has to be read with s 27 the legislature gives statutory

⁶⁵ (1924) 51 IA 368, AIR 1921 Bom 270.

effect to the rule laid down in the Privy Council case by adopting the principle of public policy underlying that decision. The disqualification, it will be noticed, is not general but confined to certain property. The murderer does not ipso facto forfeit his right to property in general or his right to inherit property of any other person, succession to whose estate is not in any manner altered or accelerated by the murder.

The section has the effect of laying down that a person who commits murder or abets the commission of murder is disqualified from inheriting—

- (1) the property of the person murdered; or
- (2) any other property he may become entitled to succeed by reason of furtherance of succession resulting from the murder.

It is not necessary for the application of this section that the person disqualified should have been convicted of murder or abetment of murder. The disqualification will apply if it is established in any subsequent proceeding that the person to be disqualified had committed or abetted the murder.⁶⁶ Thus if the case was one of suicide and there was no case of abatement, such a person would not be disqualified.⁶⁷ It stands to reason that a person prosecuted for murder but acquitted of the charge would not be disqualified. The Civil Court as a rule would not hold a fresh inquiry in such a case.⁶⁸ A grant of a share in the property of the deceased to a person is proper when there is a finding rendered by a criminal court that such person is not a murderer.⁶⁹

The expression 'murder' would be read in a wide sense and would take in its import even culpable homicide, though, of course, to some extent the matter would depend upon the facts and circumstances of the case.⁷⁰

The section applies to succession under the Act. It does not apply to succession, which is governed by the provisions of any other statute, for instance, the UP Zamindari Abolition and Land Reforms Act.⁷¹

‘...IN FURTHERANCE OF SUCCESSION...’

The reason of the rule laid down in the section is that it is contrary to public policy to permit a person to take advantage of his own wrong. Advantage may be sought by a person by murdering not the person whose property he seeks to acquire by inheritance, but some other person through whom or after whose death he may in future acquire property by inheritance. Such

⁶⁶ *Seetharamaiah v Ramakrishnaiah* AIR 1970 AP 407.

⁶⁷ *Visalakshmi v Vijayalakshmi* AIR 2004 AP 160.

⁶⁸ *Chaman Lal v Mohan Lall* AIR 1977 Del 97.

⁶⁹ *GS Sadashiva v MC Srinivasan* AIR 2001 Kant 453.

⁷⁰ *Minto v Sushil Mohan Singh Malik* AIR 1982 Bom 68; *Biro v Banta Singh* AIR 1980 P&H 164.

⁷¹ *Jamuna Dass v Board of Revenue* AIR 1973 All 397.

a case would result in furtherance of succession to the owner of the property or to state it differently would result in acceleration of succession. Thus, for instance, if *A* has a brother *B* and a nephew *C* (the son of a predeceased brother) and *C* commits the murder of *B* (*B* being the nearer heir would have been entitled on *A*'s death to succeed to *A*'s property to the exclusion of *C*), *C* becomes disqualified from inheriting the property of *A*. Or the person murdered may have restricted interest in the property and the murder may have been committed with a view to accelerating succession by removal of the person holding such restricted interest.

DISQUALIFICATION CONFINED TO MURDERER AND THOSE CLAIMING TITLE THROUGH THE MURDERER

The effect of the section read with s 27 is that the murderer is absolutely disqualified from inheriting the property of his victim or transmitting any title in respect of it. In the context of rules of succession under the old law the murderer had to be treated as non-existent and could not form the stock for a fresh descent. That basic principle has been adopted in this Act but the scheme of succession under the Act is different. The disqualification it will be noticed, is confined to the murderer and not to others. A son or daughter of the murderer, for instance, is not affected by the disqualification except in cases where the son or daughter can claim his title to succeed only through the murderer. Where such person is entitled to succeed in his or her own right as an heir of the deceased under the Act the rule laid down in the section has no application. In such a case, though related to the murderer the heir does not trace any title or right to succeed through the murderer. What s 27 requires is that the property shall devolve as if the murderer had died before the intestate and the effect of it is not that no relationship can be traced through the murderer but that no title or right to succeed can be traced through him. Thus, for instance, where *A*, the propositus died leaving as his heirs only his brother *B* and *D*, the daughter of *B* and *D* has committed *A*'s murder *B* will be disqualified from inheriting the property of *A*. *D* will, however, be entitled to succeed to the property of *A* as an heir specified in entry IV of Class II of the Schedule (Brother's daughter).

26. Convert's descendants disqualified.—Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

CONVERSION

Change of religion and loss of caste, which at one time were grounds for forfeiture of property and of exclusion from inheritance, ceased to be so after the passing of the Caste Disabilities Removal Act 1850.

Succession to the property of the apostate is governed by the personal law applicable to followers of the religion to which he had been converted or by the provisions of the Indian Succession Act. Consequently, the property of a Mohammedan converted from Hinduism passes according to Mohammedan law to his descendants and the Hindu collaterals cannot claim to succeed under Hindu law or by virtue of any provision of the Caste Disabilities Removal Act.⁷² This section lays down the converse rule that the children born to the convert after his conversion and the descendants of such children cannot inherit the property of any of their Hindu relatives unless they are themselves Hindus at the time when the succession opens. It makes no difference to the application of the rule whether the convert ceased to be a Hindu before or after the commencement of this Act. The expression Hindu in this section is to be understood in the wide sense stated and explained in s 2. It will be noticed that the children of the apostate born before his conversion are not affected by the rule. Nor are children or descendants of his children born after his conversion affected by the rule if they are Hindus at the time when the succession opens.

27. Succession when heir disqualified.—If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

The section lays down the general rule relating to the effect of disability or disqualification resulting from any of the causes mentioned in the group of ss 24 to 28 and is in accordance with the rule of Hindu law that where an heir is disqualified, the next heir of the deceased succeeds as if the disqualified person had died before the intestate.⁷³ A disqualified person transmits no interest to his or her own heir. It may be noted that as a general rule disqualification from inheritance is purely personal and does not extend to the issue of the disqualified heir unless there is any provision of law to the contrary, eg, the provision relating to the descendants of a convert from Hinduism.

The effect of the rule laid down in this section is that no title or right to succeed can be traced by any person through one who is disqualified from inheriting any property under the provisions of ss 24 to 26. The section does not affect the rights of those who cannot be said to claim through the disqualified person.

⁷² See § 97, Vol I.

⁷³ See § 101, Vol I.

28. Disease, defect, etc. not to disqualify.—No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, or any other ground whatsoever.

Under the texts of the *Dharmashastras* as interpreted by the courts, certain defects, deformities and diseases (§§ 98, 162–63, Vol I see notes on exclusion from inheritance in chapter IX, Vol I) excluded an heir from inheritance. This was substantially remedied by the Hindu Inheritance (Removal of Disabilities) Act 1928, which ruled that ‘no person, other than a person who is and has been from birth a lunatic or idiot, shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect’. The present section discards almost all the grounds, which imposed exclusion from inheritance. It rules out disqualification on any ground whatsoever excepting those expressly recognised by any provisions of the Act. Unchastity of a widow is not a disqualification under the Act.⁷⁴ Nor is conversion of an heir to any other religion a disqualification under the Act.⁷⁵

This section is not retrospective in its operation.⁷⁶

ESCHEAT

29. Failure of heirs.—If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

FAILURE OF ALL HEIRS—ESCHEAT

Escheat in Indian law is the term commonly employed to denote lapsing of property to the Crown or Government in default of heirs on the death of the owner intestate. In recent times, escheat is rare, for persons owning property but having no known heirs make wills and even when they do not, some person having remote kinship is usually found. Under the previous law on failure of all heirs of an intestate, the Crown took by escheat.

⁷⁴ *Jayalakshmi v Ganesa Iyer* AIR 1972 Mad 357; *Khagendra Nath v Karimadhar* AIR 1978 Cal 431; *Chandi Charan v Bhagyadhar* AIR 1976 Cal 356; *Girjabai v Padmabai* (1977) ILJ 708.

⁷⁵ *Asoke Naidu v Raymond S Malu* AIR 1976 Cal 272.

⁷⁶ *Appa Saheb v Garudbasamma* AIR 1960 Mys 79; *Vedavyas Rao v Narayan Rao* AIR 1962 Mys 18.

Reference may be made to §§ 58 and 59 (Vol I). Where the Crown or Government claims by escheat, the onus lies on it to show that the owner of the estate died without heirs.⁷⁷ An estate taken by escheat is subject to the trusts, charges and legal obligations (if any) previously affecting the estate, eg, mortgages and other encumbrances. This section rules that in case of failure of all the heirs recognised under the Act, on the death of the owner intestate, his or her property devolves on the Government. The Government takes the property subject to all legal obligations and liabilities to which an heir would have been subject if the property had devolved upon the heir by succession.⁷⁸ The word 'failure' used in the section is very clear and indicative of the fact that there must be a total absence of heirs of the intestate.⁷⁹ In case of a widow dying intestate, total absence of any heirs is a precondition for the widow's property to be escheated to the government.⁸⁰

Reference may be made to §§ 59 and 92, Vol I.

Some States have introduced amendments, conferring equal rights upon daughters in a coparcenery. These amendments have considerably altered the concept of a Mitakshara coparcenery, qua these states, as compared to the others where traditional mitakshara coparcenery continuous to exist. The primary reason cited for introduction of these amendments is that the exclusion of daughters has led to the creation of socially pernicious systems. The object of the amendment is to ameliorate the conditions of Hindu women.

ANDHRA PRADESH AMENDMENT

(AP Act 13 of 1986 with effect from 5.9.1985)

CHAPTER-II-A

29A. Equal rights to daughter in co-parcenary property:

Notwithstanding anything contained in Section 6 of this Act,

- (i) In a Joint Hindu Family governed by Mitakshara law, the daughter of a co-parcener shall by birth become a co-parcener in her own right in the same manner as the son and have the same rights in the co-parcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship and shall be subject to the same liabilities and disabilities in respect thereto as the son.

⁷⁷ See § 59, Vol I.

⁷⁸ Reference may be made to *Kothawale v State of Maharashtra* AIR 1970 Bom (case under s 72 Bombay Land Revenue Code 1879).

⁷⁹ *State of Punjab v Balwant Singh* AIR 1991 SC 2301.

⁸⁰ Ibid.

- (ii) At a partition such a Joint Hindu Family the co-parcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son.

Provided further that the share which a predeceased son or a predeceased daughter would have got at the partition, if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such predeceased daughter.

Provided further that the share allottable to the predeceased child of a predeceased son or of a predeceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or of the predeceased daughter as the case may be.

- (iii) Any property to which a female Hindu becomes entitled by virtue of the provisions of cl (i) shall be held by her with the incidents of co-parcenary ownership and shall be regarded notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition.
- (iv) Nothing in cl (ii) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act 1986.

29B. Interest to devolve by survivorship on death: When a female Hindu dies after the commencement of the Hindu succession (AP Amendment) Act 1986 having at the time of her death an interest in a Mitakshara co-parcenary property, her interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with this Act.

Provided that if the deceased had left any child or child of a predeceased child, the interest of the deceased in the Mitakshara co-parcenary property shall devolve by the testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.—For the purpose of this section, the interest of a female Hindu Mitakshara co-parcener shall be deemed to be the share in the property that would have been allotted to her, if a partition of the property had taken place immediately before her death irrespective of whether she was entitled to claim partition or not.

Explanation 2.—Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of the

deceased, had separated himself from the co-parcenary or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

29C. Preferential right to acquire property in certain cases:

- (1) Where, after the commencement of the Hindu Succession (Andhra Pradesh Amendment) Act 1986 an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves under s 29-A or s 29-B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.
- (2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, on the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to the application.
- (3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section ‘Court’ means the Court within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other Court which the State Government may, by notification in the Andhra Pradesh Gazette, specify in this behalf.

Amending the provisions of the Act, the Andhra Pradesh amendment of 1986 introduced new ss 29-A, 29-B and 29-C conferring equal rights on unmarried daughters in coparcenary property (see notes on variation of shares after preliminary decree).⁸¹

The benefit of this section is available to major daughters only if they are unmarried prior to the commencement of the section.⁸²

Thus the benefit of equal rights in the property cannot be availed of by minor unmarried daughters. They are not entitled to a share.⁸³

81 *S Narayan Reddy v Sai Reddy* AIR 1990 AP 263;

82 *B Chandrashekhara Reddy v State of Andhra Pradesh* AIR 2003 SC 2322

83 *G Valli v State of Andhra Pradesh* AIR 2004 AP 174.

TAMIL NADU AMENDMENT**(Tamil Nadu Act 1 of 1990, s 2 with effect from 25-3-89)****CHAPTER-II-A****29A. Equal rights to daughter in co-parcenary property:**

Notwithstanding anything contained in Section 6 of this Act,

- (i) In a Joint Hindu Family governed by Mitakshara law, the daughter of a co-parcener shall by birth become a co-parcener in her own right in the same manner as the son and have the same rights in the co-parcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship and shall be subject to the same liabilities and disabilities in respect thereto as the son.
- (ii) At a partition such a Joint Hindu Family the co-parcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son.

Provided further that the share which a predeceased son or a predeceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such predeceased daughter.

Provided further that the share allottable to the predeceased child of a predeceased son or of a predeceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or of the predeceased daughter as the case may be.

- (iii) any property to which a female Hindu becomes entitled by virtue of the provisions of cl (i) shall be held by her with the incidents of co-parcenary ownership and shall be regarded notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition:
- (iv) Nothing in this Chapter shall apply to a daughter married before the date of commencement of the Hindu Succession (Tamil Nadu Amendment) Act 1989.
- (v) nothing in cl (ii) shall apply to a partition which had been effected before the date of the commencement of the Hindu Succession (Tamil Nadu Amendment) Act 1989.

29B. Interest to devolve by survivorship on death: When a female Hindu dies after the commencement of the Hindu Succession (Tamil Nadu Amendment) Act 1989 having at the time of her death an interest in a Mitakshara co-parcenary property by virtue of the provisions of s 29-A, her interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with this Act.

Provided that if the deceased had left any child or child of a pre-deceased child, the interest of the deceased in the Mitakshara co-parcenary property shall devolve by the testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation I.—For the purpose of this section, the interest of a female Hindu Mitakshara co-parcener shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her, death irrespective of whether she was entitled to claim partition or not.

Explanation II.—Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of the deceased, had separated himself from the coparcenary or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

29C. Preferential right to acquire property in certain cases: (1)

Where, after the commencement of the Hindu Succession (Tamil Nadu Amendment) Act 1989, an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves under s 29A or s 29B upon two or more heirs and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, on the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs incidental to the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section ‘Court’ means the Court within the limits of whose jurisdiction the immovable property is situated or the

business is carried on, and includes any other Court which the State Government may, by notification in the Tamil Nadu Government Gazette, specify in this behalf.

MAHARASHTRA AMENDMENT

(Maharashtra Amendment Act 40 of 1994, with effect from 22.6.1994)

CHAPTER-II-A

29A. Equal rights to a daughter in co-parcenary property.

Notwithstanding anything contained in s 6 of this Act,

- (i) In a Joint Hindu Family governed by Mitakshara law, the daughter of a co-parcener shall by birth become a co-parcener in her own right in the same manner as the son and have the same rights in the co-parcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship and shall be subject to the same liabilities and disabilities in respect thereto as the son.
- (ii) At a partition in a Joint Hindu Family referred to in cl (i), the co-parcenary property shall be so divided as to allot to a daughter the same share as is allottable to a son;

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or of such predeceased daughter:

Provided further that the share allottable to the predeceased child of a predeceased son or a predeceased daughter, if such child had been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or of the predeceased daughter, as the case may be;

- (iii) any property to which a female Hindu becomes entitled by virtue of the provisions of cl (i) shall be held by her under the incidence of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force, as property capable of being disposed of by her by will or other testamentary disposition.
- (iv) Nothing in this Chapter shall apply to a daughter married before the date of the commencement of the Hindu

Succession (Maharashtra Amendment) Act 1994 (Mah XL of 1994).

- (v) Nothing in cl (ii) shall apply to a partition which has been effected before the date of commencement of the Hindu succession (Maharashtra Amendment) Act 1994.

29B. Interest to devolve by survivorship on death: When a female Hindu dies after the commencement of the Hindu Succession (Maharashtra Amendment) Act 1994 (Mah XL of 1994), having at the time of her death an interest in a Mitakshara co-parcenary property by virtue of the provisions of section 29A, her interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with this Act.

Explanation I—For the purpose of this section, the interest of a female Hindu Mitakshara co-parcenary shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death, irrespective of whether she was entitled to claim partition or not.

Explanation II.—Nothing contained in the proviso to this section shall be construed as enabling a person who, before the death of the deceased, had separated himself or herself from the co-parcenary or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

29C. Preferential right to acquire property in certain cases: (1) Where, after the commencement of the Hindu succession (Maharashtra Amendment) Act 1994 (Mah XL of 1994), an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves under s 29A or s 29B upon two or more heirs and any one of such heirs proposes to transfer her or his interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, on the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incidental to the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.—In this section 'Court' means the Court within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other Court which the State Government may, by notification in the Gazette, specify in this behalf.

CHAPTER III

TESTAMENTARY SUCCESSION

30. Testamentary succession.—Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him [or by her]^{84a}, in accordance with the provisions of the Indian Succession Act 1925(39 of 1925), or any other law for the time being in force and applicable to Hindus.^{84b}

Explanation.—The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a *tarwad*, *tavazhi*, *illom*, *kutumba* or *kavaru* in the property of the *tarwad*, *tavazhi*, *illom*, *kutumba* or *kavaru* shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section.

Since the amended section empowers a female Hindu with the right to dispose off property by will or other testamentary disposition, the succeeding commentary will thus have to be read as also affording a female Hindu a right of such disposal.

RIGHT TO DISPOSE OFF PROPERTY BY WILL

Section 30 is merely an assertion of the general rule that a Hindu may dispose of by will any property which is within his power to bequeath by any testamentary disposition. It is the Explanation, which is really the vital and most important part of the section. It might have been enacted in a more direct manner, that the interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member in the property of a *tarwad*, etc is a property now capable of being disposed of by will, notwithstanding any other rule of law to the contrary. The section removes the disability against a coparcener disposing off his interest in coparcenary property by will.⁸⁵

Neither under the customary law nor under the Aliyasantana Act 1949, the interest of a coparcener in an *Aliyasantana Kutumba* could have been

84 (a) Inserted by the Hindu Succession (Amendment) Act 2005;

(b) Part of this section was omitted by the Repealing and Amending Act 58 of 1960 and sub-s (2) was omitted by Act 78 of 1956. The word sub section was substituted by section at the end of the Explanation by Act 56 of 1974.

85 *Senthilkumar v Dhandapani* AIR 2004 Mad 403.

disposed of by a will. In that regard a definite change is made by the Explanation with the result that now a member of an *Aliyasantana Kutumba* or *Kavaru* can dispose of his interest in the *kutumba* properties by a will.⁸⁶ So also the interest of a Hindu governed by the *Marumakkattayam* or *Nambudri* law in the property of a *tarwad*, *tavazhi* or *illom*, can now be disposed off by will.

However, a female who is a *nissathathi kavaru* governed by the Madras Aliyasanthana Act 1949, is not competent to bequeath by will her divided interest in the property acquired by her as a partition under ss 35 and 36 of Madras Aliyasanthana Act 1949. Section 14 of the present Act does not apply to any such case.⁸⁷

The Punjab Customary Law is a 'law for the time being in force' within the meaning of the section and a testator under that law applicable to *Jats* can make a testamentary disposition of his property by his will in favour of a close relative in lieu of services rendered, if the testator is sonless.⁸⁸

According to Dayabhaga law, a father may dispose of by will all his property, whether ancestral or self-acquired. Similarly, a coparcener under that law may dispose off by will the whole of his interest in the joint family property. These rules are well established and sub-s (1) in effect reiterates the same.

According to Mitakshara law, no coparcener, not even a father, can dispose of by will his undivided coparcenary interest even if the other coparceners consent to the disposition, the reason being that at the moment of the death the right of survivorship (of the other coparceners) is in conflict with the right by device. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by device. That rule of Mitakshara law is now abrogated by the Explanation which lays down in explicit terms that such interest is to be deemed to be property capable of being disposed of by will notwithstanding anything contained in any provision of the Act or any other law for the time being in force.

The power conferred by this section upon a member of a joint family to make a will in respect of his interest in the joint family property cannot be extended to a case of gift.⁸⁹

86 *Sundrara v Girija* AIR 1962 Mys 72 (FB); as to the effect of s 43 of the Travancore Kshatriya Act and this Explanation; reference may be made to *Bank of New Ltd v Poonamma* AIR 1961 Ker 105 (FB); *Sundari v Laxmi* AIR 1980 SC 198, 202, 203.

87 *Shivadeviamma v Sumanji* AIR 1973 Mys 299 (FB).

88 *Rali Ram v Shiv Charan* AIR 1981 P&H 376 (FB) (*Gaur Brahmin & Rohtak Jettisir*).

89 *MSBY Board v Subramania* AIR 1973 Mad 277.

WILL BY FEMALE HINDU

Prior to the coming into force of this Act, neither under Mitakshara nor under Dayabhaga law, could a widow or other limited female heir in any case dispose of by will any property inherited by her or any portion thereof, whether the property was movable or immovable. The effect of s 14 of this Act inter alia, is to abrogate that traditional limitation. She is now a full owner of all property howsoever acquired and held by her and can dispose of it by will. The only qualification to this rule is that she cannot do so where she holds any property as 'restricted estate' as visualised under s 14(2). This is so because in any such case she is not and has not become full owner of the property. Similar is the position in respect of a female owner governed by any of the matriarchal systems of law.

SUB-SECTION (2)

Sub-section (2) of this Act, which is now repealed by s 29 of the Hindu Adoptions and Maintenance Act 1956, was as under:

For the removal of doubts it is hereby declared that nothing contained in sub-s (1) shall affect the right to maintenance of any heir specified in the Schedule by reason only of the fact that under a will or other testamentary disposition made by the deceased the heir has been deprived of a share in the property to which he or she would have been entitled under this Act if the deceased had died intestate.

Reference may be made to s 22 of the Hindu Adoptions and Maintenance Act 1956. The provisions of that section have now rendered sub-s (2) of the present section unnecessary.

As regards the valid execution, essential ingredients etc of a will, see the decision in *Bhagyawati Jain v General Public*.⁹⁰

CHAPTER IV

REPEALS

31. Repeals.—[Rep. by the Repealing and Amending Act, 1960 (58 of 1960), Sec. 2 Sch. 1.]

This section repealed certain Acts. The repeal of this section by Act 58 of 1960 does not mean that the repealed Acts are revived. The effect of the original repeal was to remove those repealed Acts from the statute book.⁹¹ The Jaipur Hindu Women's Right to Property Act 1947 was not repealed by the original section 31.⁹²

⁹⁰ AIR 1995 P&H 201.

⁹¹ *Vidyaben v Jagdishchandra* AIR 1974 Guj 23

⁹² *Hari Singh v Sireh Kanwar* AIR 1974 Raj 197.

The Schedule

(See section 8)

HEIRS IN CLASS I AND CLASS II**CLASS I**

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son; [son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son].¹

CLASS II

- I. Father.
- II. (1) Son's daughter's son; (2) son's daughter's daughter; (3) brother; (4) sister.
- III. (1) Daughter's son's son; (2) daughter's son's daughter; (3) daughter's daughter's son; (4) daughter's daughter's daughter.
- IV. (1) Brother's son; (2) sister's son; (3) brother's daughter; (4) sister's daughter.
- V. Father's father; father's mother.
- VI. Father's widow; brother's widow.
- VII. Father's brother; father's sister.
- VIII. Mother's father; mother's mother.
- IX. Mother's brother; Mother's sister.

Explanation.—In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

1 Added by the Hindu Succession (Amendment) Act 2005.

THE HINDU MINORITY AND GUARDIANSHIP ACT 1956

1. Short title and extent	480
2. Act to be supplemental to Act 8 of 1890	480
3. Application of the Act	481
4. Definitions	482
5. Overriding effect of Act	483
6. Natural guardians of a Hindu minor	484
7. Natural guardianship of adopted son	490
8. Powers of natural guardian	491
9. Testamentary guardians and their powers	499
10. Incapacity of minor to act as guardian of property	503
11. De facto guardian not to deal with minor's property	504
12. Guardian not to be appointed for minor's undivided interest in joint family property	507
13. Welfare of minor to be paramount consideration	508

INTRODUCTORY NOTE



INDIAN MAJORITY ACT 1875

In Hindu law, apart from statute, the generally accepted view has been that nonage terminates at the completion of the 16th year and, minority is a term applied to that period of life of a male or female which precedes the completion of that age. There was some difference of opinion as to the age when a person, under the law of the *smritis*, could be said to have attained full age or majority. That difference lost much of its importance after the passing of the Indian Majority Act 1875, which applies to all persons domiciled in India and to all matters except marriage, dower, divorce and adoption. According to that Act, every minor for whose person or property a guardian has been appointed by any court and every minor of whose property the superintendence has been assumed by a court of wards is deemed to have attained his majority at the completion of the 21st year; and in all other cases, at the completion of the 18th year. The Indian Majority Act is a very short enactment and aims at uniformity and certainty in the matter of nonage and its object is to fix the age of majority.

According to the law relating to guardians as hitherto applied in the case of Hindus, guardians could be divided into three classes, namely: (1) natural guardians; (2) guardians appointed by a father's will (testamentary guardians); and (3) guardian appointed under the Guardians and Wards Act 1890. The guardians under the Guardians and Wards Act can be appointed by a district court or by a Chartered High Court in the exercise of its ordinary original civil jurisdiction. A Chartered High Court can also appoint a guardian in the exercise of its inherent powers.

GUARDIANS AND WARDS ACT 1890

The principal enactment on the subject is the Guardians and Wards Act of 1890, which is a consolidating enactment and is intended to be a complete Code defining the rights and remedies of guardians and wards. Section 8 of that Act, however, *inter alia*, saves the rights of appointment of guardians of minor children under the Hindu law and leaves unaffected the preferential

claims of guardians under that law according to which the father is the natural guardian of the person and the separate property of his minor children and next to him, the mother. No relative other than the parents under that law is entitled as of right to the guardianship of a minor except that the husband is the lawful guardian of his minor wife.

Natural Guardians Under Hindu Law

The Act vests wide powers in the court to appoint or declare a guardian of the person or property, or both, of a minor and empowers it to do so where it is satisfied that it is for the welfare of the minor to make such order. However, the Act was not intended to affect the rights of the parents and the husband to act as the natural guardians of the person of the minor and the court had, under the enactment, no authority to appoint a guardian for the person of a minor whose father is living and is not in the opinion of the court, unfit to be a guardian of the person of the minor; nor in case of a married female, if a minor, whose husband is not in the opinion of the court, unfit to be guardian of her person.

Rights of Natural Guardian Under Hindu Law

The Guardians and Wards Act did not alter or affect the rights of the natural guardians under the Hindu Law and it was only if a guardian was appointed by the court that the rights of the natural guardian became extinguished. The rights of the natural guardian under the law as interpreted by the courts were comparatively very wide. The natural guardian could mortgage, sell or otherwise dispose of the immovable property of the minor, even without the sanction of the court, provided the alienation was for the benefit of the minor's estate. The law on the subject was well-settled by a long course of decisions since *Hunooman Persaud Pandey's* case.¹ The principle enunciated by the Privy Council in that case in a passage which is now *locus classicus* is:

The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate... . The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded... . The lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But... if he does so inquire, and acts honestly, the real existence of an alleged, sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge.

¹ 6 MIA 393.

However, doubts and difficulties at times beset the question of contracts by natural guardians and their right to bind the minor by personal covenants and the precise extent of the powers of the natural guardian of a minor to deal with the properties of the infant on grounds of necessity or benefit of the minor. The delimitations on the power were well-defined but difficulty sometimes arose in applying the principles to facts, which were at times, complex, and gave rise to difficult situations.

Testamentary Guardians Under Hindu Law

Under Hindu law, as hitherto administered by the courts, a Hindu father could by word of mouth or by writing, nominate a guardian, both of the person and property of the children, so as to exclude even the mother from the guardianship. The mother, even if the father was dead, did not have the testamentary power to appoint a guardian by will. The power of a testamentary guardian to deal with property belonging to his ward was under that law, subject only to the restrictions imposed by the will.

Powers of Testamentary Guardian

The Guardians and Wards Act did not affect the power of the father to appoint a testamentary guardian. Section 6 of the Guardians and Wards Act, contains a saving *inter alia* to the effect that nothing in that enactment is to take away or derogate from any power to appoint a guardian (including testamentary guardian), of the person and property of a minor where under the personal law of the minor, such appointment is competent. The power of a testamentary guardian to mortgage, sell or otherwise dispose of the immovable property of the minor is under that Act, only subject to the restrictions which may be imposed by the will, unless he is also declared to be a guardian by an order of the court. In the latter case, his powers are controlled by the relevant provisions of the Guardians and Wards Act (s 28).

Section 27 of the Guardians and Wards Act, which applies to all classes of guardians, lays down general rules affecting duties and powers of guardians. A guardian is bound to deal with the property of the minor wards as carefully as a man of ordinary prudence would deal with it if it were his own, and subject to limitations on his powers laid down in the Act, he has the power to do all acts which are reasonable and proper for the realization, protection or benefit of the property of the minor. Section 29 of the Act lays down certain limitations on the powers of a guardian appointed or declared by the court in respect of his dealing with and management of the immovable mortgage or charge, or transfer by sale, gift, exchange or otherwise, any such property; nor can he without the permission of the court lease any part of the property for a term exceeding five years or for a term extending more than one year beyond the date of attainment of majority by the ward. The powers of the natural guardian or a testamentary guardian of a Hindu minor were not affected by these limitations. The rights of any such guardian

to deal with and manage the minor's property, continued to be governed by the rules to which reference has already been made, unless and until the court in the exercise of its wide powers removed him or appointed or declared him to be a guardian of the minor in which latter case, his powers to deal with and manage the minor's property became limited as provided in s 29 of the Act.

The keystone of the Guardians and Wards Act is the satisfaction of the court as to what is for the welfare of the minor and the Act provides the machinery which enables the court to protect the interest and welfare of the minor, who by reason of his immature age, is incapable of looking after the same. Section 17 of the Act is pivotal, and inter alia enacts that in appointing or declaring the guardian of a minor, the court shall be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In considering what will be for the welfare of the minor, the court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. If the minor is old enough to form an intelligent preference, the court may consider that preference. In numerous decisions under the Act, it has been emphasised that the welfare of the minor is the paramount consideration and the recognised rights of guardians under the personal law must, if necessary, be subordinated to that main consideration and the court is not bound to appoint as guardian the person who has a preferential claim for guardianship according to the personal law if the appointment of such person will not conduct to the minor's welfare.

Supplemental Enactment

The present Act does not codify the entire law of guardianship applicable to Hindus but amends and codifies only certain parts of the law relating to minority and guardianship among Hindus. Section 2 of the Act expressly lays down that the provisions of this Act are in addition to and not in derogation of the Guardians and Wards Act 1890. The provisions of the Act are, therefore, to be read as supplemental to that Act. In respect however, of matters expressly dealt with by the Act, the provisions of this Act are to have an overriding effect. Such provisions abrogate all the rules of the law of guardianship hitherto applicable to Hindus by virtue of any text or rule of Hindu law, or any custom or usage having the force of law, in respect of all matters dealt with in those provisions. They also supersede any other law contained in any state or Central legislation (including the Guardians and Wards Act) in force immediately before it came into operation in so far as such legislation is inconsistent with those provisions. Rules relating to matters for which no provision is made are not overridden by the Act.

Principal Changes Brought About by the Act

Restriction Imposed on Powers of Natural and Testamentary Guardian

Reference to the provisions of this short enactment will show that it is principally intended to crystallise in statutory form as to who are the persons entitled to act as the natural and testamentary guardians of a Hindu minor and particularly to impose certain limitations on the powers of such guardians in the matter of disposal of the management of the immovable property of the minor. Section 6 declares the status of the father and mother as natural guardians of the minor children in respect of their person as well as property; and of the husband as the natural guardian of the person and property of his minor wife. There is no substantial change in the law on this matter. However, material change is effected in the matter of the powers of the natural guardian which are now substantially the same as and subject to the same limitations as are imposed upon the powers of a guardian declared or appointed by the court under the Guardians and Wards Act. The result is that the natural guardian does not now have in the matter of disposal of the immovable property of the minor, any powers larger than those conferred on the guardian appointed or declared by that Act. The language of s 8 of the present Act in relation to limitations on the powers of management of immovable property of the minor is in *pari materia* with that of the provisions contained in s 29 of the Guardian and Wards Act which have already been stated above. Section 9 of the present Act rules that a Hindu father has the power to appoint a testamentary guardian of his minor legitimate children, both, in respect of the person and property of such children. A similar power is now recognised in case of the mother where the father has predeceased the mother. A mother is also entitled to appoint a testamentary guardian of her minor illegitimate children. The powers, however, of any testamentary guardian of a minor Hindu, in the matter of dealing with the management of the immovable property of the minor, are not to be governed by the personal law of the parties, but are now subject to the same limitations as are imposed upon the powers of a natural guardian. The result of these principal changes in the law relating to Hindu minors is that neither a natural guardian nor a testamentary guardian can now, without the sanction of the court, mortgage, charge, sell or otherwise alienate any immovable property of the minor or lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date of attainment of majority by the word. Any disposal of immovable property by a natural guardian or a testamentary guardian in contravention of the above limitations, is voidable at the instance of the minor. The power vested in the court to sanction any such disposal of the minor's immovable property can only be exercised if there is necessity for such disposal, or if the court

is satisfied that the disposal of the property is to the evident advantage of the minor.²

Powers of de Facto Guardian Abrogated

Another change brought about by the present enactment relates to de facto guardians. The powers of a de facto guardian or a de facto manager of a Hindu minor to bind the minor's estate by the alienations of immovable property of the minor in case of necessity or for the benefit of the minor's estate had been recognised by the courts in numerous decisions.³ Section 11 of the Act now abrogates those powers and lays down in express terms that after the coming into operation of the Act, no person shall be entitled to dispose of, or deal with the property of a Hindu minor on the ground of his or her being the *de facto* guardian of the minor.

Welfare of the Minor Must be the Paramount Consideration

The Crown or the State as *pater patriae* has jurisdiction to do all acts and things necessary for the protection of minors for they cannot take care of themselves and one common principle of law is that it is a prime duty of the court where satisfied, that it is for the welfare of the minor that an order should be made appointing or declaring a guardian of his person or property, it should make such order. Sections 7 and 17 of the Guardians and Wards Act, give statutory form to this general rule of guardianship law. The present enactment, although it is not exhaustive of the law on the subject and gives only certain supplemental rules principally affecting natural and testamentary guardians and the restrictions on the powers of such guardians, reiterates the salutary rule that in appointing or declaring guardians of the person or property of a Hindu minor, the paramount consideration of the court should be the welfare of the minor (s 13). The expression 'welfare' in this context, it is settled law, is to be understood in its widest sense and embraces not merely the material and physical well-being of the minor and happiness, but every circumstance and every factor bearing upon the moral and religious welfare and the education and upbringing of the minor. In the matter of any such appointment or any such appointment or declaration of a guardian, the first and the inevitable starting point and the dominant consideration for the court at every stage is the welfare of the minor.

² See s 8 and s 9(5).

³ See § 528 (Vol I).

THE HINDU MINORITY AND GUARDIANSHIP ACT 1956



32 OF 1956

[25 August 1956]

An Act to amend and codify certain parts of the law relating to minority and guardianship among Hindus

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows:

PREAMBLE

A codifying enactment is passed to codify the existing law and its purpose is to declare the whole of the law upon some particular subject or certain particular matters dealt with in it. The preamble to the present enactment states that it is intended to amend and codify certain parts of the law relating to minority and guardianship among Hindus and it is only in respect of the points and matters specifically dealt with in it that the law relating to minority and guardianship among Hindus is codified in the enactment which does not purport to give the whole law on the subject of guardianship. Section 2 of the Act states in explicit terms that the provisions of the Act are supplemental to, and to be read as additional to, and not in derogation of those contained in the Guardians and Wards Act of 1890, which is the principal enactment on the subject. Where, however, an express provision on any point or matter is contained in this Act, it is to prevail and effect must be given to it irrespective of what may have been laid down in the other enactment.

RULES OF INTERPRETATION OF A STATUTE

For some of the rules relating to interpretation, see notes under The Hindu Marriage Act *supra*.

1. Short title and extent.—(1) This Act may be called the Hindu Minority and Guardianship Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

‘DOMICILED’

See notes under s 1 of the Hindu Marriage Act 1955.

COMMENCEMENT AND EXTENT

The Act received the assent of the President on 25 August 1956, and came into operation on that day.¹

The Act applies to Hindus in the whole of India, except the State of Jammu and Kashmir. The Act applies to Hindus domiciled in India but who are outside India. The general principle of private international law is that the *lex loci* govern matters relating to immovable property and the law of the domicile governs personal relations.

2. Act to be supplemental to Act 8 of 1890.—The provisions of this Act, shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890 (8 of 1890).

ACT IS SUPPLEMENTAL TO THE GUARDIANS AND WARDS ACT

The Act, although it is an amending and codifying enactment, is not exhaustive of the law on the subject of minority and guardianship among Hindus. The effect of this section read with s 5 of the Act, which gives overriding operation to the provisions of this Act, is to abrogate all the rules of the law or guardianship hitherto applicable to Hindus by virtue of any text or rule of Hindu law or any custom or usage having the force of law in respect of all matters dealt with in the Act. The Act also supersedes any other law, contained in any Central or state legislation, in force, before it came into operation, in so far as such legislation is inconsistent with those provisions. Rules relating to matters for which no provision is made are not overridden by the Act. The Guardians and Wards Act, as already pointed out, is the

¹ General Clauses Act s 5(1)(b)

principal enactment on the subject and is a complete Code defining the rights and remedies of guardians and wards. That Act, however, saves from its operation, the personal law of the minors in certain matters and does not purport to lay down the law in respect of the powers of the natural and testamentary guardians under such personal law. The present Act is principally intended to declare in statutory form as to who are the persons entitled to act as the natural guardians of a Hindu minor in respect of the person and property of the minor, and to impose certain restrictions on the power of such guardians. It is also intended to state the law relating to testamentary guardians and the delimitations on the powers of such guardians. It is, therefore, both a codifying and a supplemental enactment and its provisions must be read in the context of the law laid down in the Guardians and Wards Act 1980.

The provisions of this Act and the Guardian and Wards Act 1890, are complementary. In case of repugnancy, the provisions of this Act would prevail.²

3. Application of the Act.—(1) This Act applies,—

- (a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.
- (b) to any person who is a Buddhist, Jaina or Sikh by religion, and
- (c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:

- (i) any child, legitimate or illegitimate, both or whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
- (ii) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of a tribe, community, group or family to which such parent belongs or belonged; and
- (iii) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

² *Kusa Paride v Baishnab* AIR 1966 Ori 60.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Schedule Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification of the Official Gazette, otherwise directs.

(2A) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to Renoncants of the Union Territory of Pondicherry.

(3) The expression 'Hindu' in any provision of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

PERSONS GOVERNED BY THE ACT

It may be seen from § 6(1) (Vol I) that Hindu law has been applicable to a wide category of persons. The present section substantially codifies the law on the question as it existed at the time of the passing of this enactment and is in *pari materia* with the law on the question enacted in s 2(1)(c) of the Hindu Marriage Act 1955.

Reference may be made to notes under the Act and to §§ 6 and 7 (Vol I).

See under Hindu Marriage Act: sub-section (1)(a), (b) and (c); *Explanation* (b) and (c); sub-s (2) and sub-s (3).

4. Definitions.—In this Act,—

- (a) 'minor' means a person who has not completed the age of eighteen years;
- (b) 'guardian' means a person having the care of the person of a minor or of his property or of both his person and property, and includes:
 - (i) a natural guardian,
 - (ii) a guardian appointed by the will of the minor's father or mother,
 - (iii) a guardian appointed or declared by a court, and
 - (iv) a person empowered to act as such by or under any enactment relating to any Court of Wards;
- (c) 'natural guardian' means any of the guardians mentioned in section 6.

It will be noticed that the practice of inserting the words 'unless the

context otherwise requires' usually followed by the legislature in the matter of sections giving statutory definitions has not been adhered to in this section. Nevertheless, definitions and abbreviations have to be read subject to the qualification that their application must not be inconsistent with the context or subject matter. This follows as a corollary to the general principle of construction that if there is repugnance in the context, words and expressions in a statute must be understood in a manner as will be in harmony with the context and to effectuate the intention of the legislature. The definitions in this section seem mainly intended to stress that for the purpose of the Act a person is to be regarded as a minor till completion of the age of 18 and to make it clear that the expression 'guardian' has a wide connotation.

After the Act came into force no person can claim to be the legal guardian of a minor unless he or she comes within one of the four classes of persons enumerated in cl (b) of the section.³ A document effecting a partition would not be invalid if the minor is represented by the mother, more particularly when the father does not raise any objection, since the mother is a natural guardian.⁴ A stranger who makes a gift of property to a minor is not entitled to appoint a guardian for the minor simply by reason of the factum of the gift. He may, however, provide for management of such property by resorting to a trust.⁵

Reference to the provision of the Act will show that a person, though not a natural guardian, or a testamentary guardian, or one appointed or declared by the court or empowered by any statute relating to the court of wards may be a guardian within the ambit of this Act, if he has taken upon himself or herself the care of the person or property or both, of a minor, for example, a *de facto* guardian though, of course, after the commencement of this Act, he is not entitled to dispose of, or deal with the property of the minor.⁶

5. Overriding effect of Act.—Save as otherwise expressly provided in this Act,—

- (a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this act shall cease to have effect with respect to any matter for which provision is made in this Act.

³ *Ramachandra v Annapurni Ammal* AIR 1964 Ker 269; also see s 11.

⁴ *K Jagannathan v Vasudevan Chettiar* AIR 2001 Mad 184.

⁵ *Rajalakshmi v Ramachandra* AIR 1967 Mad 113.

⁶ Section 11; also *Ratan v Bisan* AIR 1978 Bom 190 (an application can be maintained by a minor under s 41 of the Guardians and Wards Act 1890, for recovery of possession of property from a *de facto* guardian even after the present Act came into operation).

- (b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

OVERRIDING EFFECT OF THE ACT

The section gives overriding application to the provisions of the Act, and in effect lays down that in respect of matters dealt with in the Act, it seeks to repeal all existing law on the matters dealt with in it, whether in the shape of enactments or otherwise, which may be inconsistent with it. The result is that immediately on the coming into operation of the Act, the law of guardianship hitherto applicable to Hindus, whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having the force of law, ceases to have effect with respect to all the matters dealt with in the Act. The Act also supersedes the rules of the law or guardianship contained in any Central or state enactment⁷ and any other law in force immediately before it came into operation by enacting that all other law shall cease to have effect with respect to such matters in so far as it is inconsistent with any provisions contained in the Act. This section may be read with s 2 which refers to the Guardians and Wards Act 1890, and draws attention to the supplemental nature of the provisions of this Act.

The effect of ss 4(a) and 5(b) is not to override the first part of s 3 of the Guardian and Wards Act. The age of majority, therefore, of a minor for whose person a guardian has been appointed by the court will be 21 years and not 18 years.⁸

6. Natural guardians of a Hindu minor.—The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

- (a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
- (b) in the case of an illegitimate boy or an illegitimate unmarried girl—the mother, and after her, the father;

⁷ For instance, see Travancore Nayar Act, s 10(2); *Kamalakshmi Amma v Bhaskara Menon* AIR 1961 Ker 151, *Ramachandra v Annapurni Ammal* AIR 1964 Ker 269, *Kusa Paride v Baishnab* AIR 1966 Ori 60. Reference may also be made to s 15 of the Madras Marumakkathayam Act 1932, *Raghavan Nan v Lakshminikutty Amma* AIR 1961 Ker 193.

⁸ *Suammatban v Angavarkanni Ammal* AIR 1964 Mad 11, *Re Prakash Naumtishai* AIR 1986 Guj 116.

(c) in the case of a married girl—the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section—

- (a) if he has ceased to be a Hindu; or
- (b) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati* or *sanyasi*).

Explanation.—In this section, the expressions ‘father’ and ‘mother’ do not include a step-father and a step-mother.

NATURAL GUARDIANS

The subject of persons who can be the natural guardian of a Hindu minor, under law hitherto applied, has been dealt with in §§ 518–27 (Vol I). This section does not make any substantial alteration in the law on the subject and is mainly declaratory of the same.

The position in the Hindu law hitherto applied under this section is the same. Normally, when the father is alive, he is the natural guardian and it is only after him that the mother becomes the natural guardian. There can, however, be an exceptional case where the minor can be legally represented by the mother as the natural guardian, even though the father may be alive. Thus, for instance, where the father of the minor was alive but the father and mother had fallen out and the mother with whom the minor was living had been managing the affairs of the minor daughter for over 20 years, it was held that a leave executed by the mother on behalf of the minor was valid and binding on the minor, the mother being regarded as the natural guardian of the minor in the particular circumstances of the case.⁹

The word ‘after’ used in sub-s (a) does give an impression that the mother can be considered to be the natural guardian of the minor, only after the life-time of the father. If the section is interpreted as such, it would have to be struck down as unconstitutional on the ground that it violates gender equality. The word ‘after’ is used in this section as meaning ‘in the absence of’ and not necessarily, after the life-time, ‘of the father’. Absence of the father here, has to be read as absence from the care of the minor’s person or his property for any reasons whatsoever. The situations of the absence of the father in this context, may be numerous. He may not be in the actual charge of the affairs of the minor, either because of his indifference or because of an agreement between him and the mother, and if the minor is in the exclusive care and custody of the mother or the father is unable to care for the minor or his property because of his physical or mental incapacity. All the acts of the mother would be valid in such circumstances

⁹ *Jijabai v Pathankhan* AIR 1971 SC 315.

even during the life-time of the father, who would be deemed to be 'absent' for the purposes of this section and other allied acts dealing with guardianship like the Guardianship Act, and also s 19(b) of the Guardians and Wards Act.¹⁰ The Supreme Court, while interpreting this section has held that it would operate prospectively, and passed decisions could not be reopened to test the veracity of the passed transactions on the touchstone of its pronouncement.

(Where the father refuses to act as the natural guardian or has neglected to discharge his obligations as such guardian in respect of the minor and his property, another person and more so, the mother of the minor can take recourse to legal proceedings for being appointed as a guardian of the person and property of the minor.¹¹ The mere fact that the mother has remarried is no disqualification under the Act and she can act as the natural guardian of the minor.¹² When there is nothing to indicate that the father has abdicated his responsibilities as the natural guardian of the minor after the mother's death, the grandmother cannot be treated as the de facto guardian.¹³

As a general rule, the court would appoint the father as a guardian of the minor and would not deprive him of custody of the minor if it is satisfied that having regard to the facts and circumstances of the case, the father should have the custody of the minor.¹⁴ However, in all such cases, the dominant consideration in appointing the guardian, should be the welfare of the minor child and the court may not give custody of the minor to the father.¹⁵ Reference may be made to the undermentioned decision of the Supreme Court.¹⁶

10 *Githa Hariharan v Reserve Bank of India* AIR 1999 SC 1149 (case law discussed).

11 *Narian Singh v Sapurna Kuer* AIR 1968 AP 318; *Tbulasi Kumar v Raghavan* AIR 1985 Ker 20; *Cf Sobha Dai v Bhimi* AIR 1975 Ori 180.

12 *Bakshi Ram v Shila Devi* AIR 1960 Punj 304; also see § 523 (Vol I).

13 *Palchuri Hanumayamma v Tadi Kamalla Kotalingam* (2001) 8 SCC 552.

14 *Shobalata v Mahenda* AIR 1979 Raj 29 (custody of the minor daughter was given to the mother, but the mother was out of India for a long time leaving the minor in care of her own parents: father appointed guardian and given custody).

15 *Baburam v Keshwa Chand* AIR 1978 P&H 174 (son 14 years old brought up by mother's parents: preference of minor; *Venkatakrishnaiah v Sathyakumar* AIR 1978 Kant 220 (custody with parents of deceased mother of the child: custody not given to father); *Santhakumari v Natarajan* (1973) 2 MLJ 286 (child below five years); *Manju Tiwari v Rajendra Tiwari* AIR 1990 SC 1156 (child below five years: custody with mother).

16 *Mobini v Virendra Kumar* AIR 1977 SC 1359 (mother declared entitled to guardianship and custody of minor son 11 years old); *Surinder Kaur v Harbax Singh* AIR 1981 SC 1221 (parents made England their home: order of High Court of England for custody of minor son aged 8 years in favour of mother; father removing boy to India—jurisdiction of English court not ousted: welfare of minor paramount consideration even though father is natural guardian); *Rosy Jack v Jacob* AIR 1973 SC 209; *Onkar Walia v Urmila Devi* AIR 1985 HP 10.

'...EXCLUDING HIS OR HER UNDIVIDED INTEREST IN JOINT FAMILY PROPERTY'

The subject matter with which the Act deals is limited to guardians in respect of minor's person or in respect of minor's property other than his undivided interest in joint family property, whether they be natural guardians or testamentary guardians, or guardians appointed or declared by court and the concept of a guardian in respect of the undivided interest of a minor in joint family property is specifically excluded from the purview of the Act.¹⁷

The interest of a minor in joint family property being kept outside the purview of this section, it would be open to a father or natural guardian of the minor to alienate the minor's interest in the property of the joint family. This would be in accordance with Hindu law relating to joint family.¹⁸

CLAUSE (A): FATHER—MOTHER: CUSTODY

This clause affirms the rule of Hindu law that the father is the natural guardian of the person as well as the property of a minor son and a minor unmarried daughter; and next to him, the mother is the natural guardian of the person and property of such minor. The clause gives legislative sanction to the principle now well-established that even though the father is the natural guardian of his minor children and entitled as such, to their custody and, though it is the duty of the court to make orders for appointment of a guardian and custody of the minor consistently with the personal law of the minor, the prime and the paramount consideration is the welfare of minor, and the custody of a child of tender years should, therefore, remain with the mother, unless there are grave and weighty considerations which require that the mother should not be permitted to have the minor with her. This clause rules that though the father is the natural guardian of the minor's person and property, the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Unless there are some special facts and circumstances clearly indicating that it is not in the interest and well-being of the minor of such tender age to be with the mother, the custody of the minor should be with the mother. The right provided in favour of the mother under this clause is as to the custody of the infant. It is not necessary that in any such case the father should be removed from guardianship or that the mother should be appointed guardian.¹⁹ As regards preference in

17 *Re Krishnakant* AIR 1961 Guj 68.

18 *Arun Kumar v Chandravati* AIR 1978 All 221; reference may also be made to notes under s 8.

19 *Suresh Babu v Madhu* AIR 1984 Mad 186; *KS Mohan v Sandhya Mohan* AIR 1993 Mad 59 (on the facts of the case, custody awarded to father); *Radha v Rangappa* AIR 2004 Kant 299 (custody to father).

matters of custody, there can be no general principle that the mother has to be preferred to the father. The question of custody of a child would have to be determined on consideration of the attendant facts and surrounding circumstances including the age, sex and requirements of the child amongst others, the underlying principle always being the welfare of the child.

The rule is not to be understood to suggest that on completion of the age of five years, the custody of the child should be directed to be handed over to the father in view of his preferential rights. The court takes into consideration all the circumstances of the matter, bearing in mind that the pivotal factor is the benefit and well-being of the minor. The facts and circumstances the courts take into consideration may vary in each particular case and obviously, cannot be listed. Sub-sections (2) and (3) of s 17 of the Guardians and Wards Act state rules which are of some guidance on the question. In considering what will be for the welfare of the minor, the court shall have regard among other factors, to the age, sex and religion of the minor, the character and capacity of the guardian and if the minor is old enough to form an intelligent preference, the court may consider the preference. This section may be read with s 13 which gives legislative sanction to the rule that in such matters the welfare of the minor shall be the paramount consideration. So paramount is this consideration that, having regard to all the relevant factors touching the case, the court took the view that the conversion of the mother to a different faith cannot by itself be treated as a disqualification for custody of the minor, so long as the mother is capable of providing a congenial, comfortable and happy home for the minor.²⁰

In a matter, relating to custody of a minor, the court would look at the substance of the application and would not be overly concerned with mere technicalities of pleadings.²¹

The proposition is now firmly established that even the preferential right of the father as a natural guardian should be subordinated to and even overridden by the sole consideration that the welfare of the minor is to be the determinative factor in all matters of guardianship. For some pertinent decisions of the apex court, illustrative of the rule, see footnote below.²²

20 *Sheila v Soli Phirozshaw* AIR 1981 Bom 175.

21 *Snehalata v Mahendra Narain* AIR 1980 Raj 64.

22 *Mohini v Virendra Kumar* AIR 1977 SC 1359; *CS Reddy v Yamuna* AIR 1975 Kant 134 (custody of son aged 10 and daughter aged 12 given to the mother); *Venkatakrishnaiah v Sathyakumar* AIR 1978 Kant 220 (to maternal grandparents); *Bikramjit Singh v Iqbal Kaur* AIR 1974 P&H 124 (custody of daughter five years old given to father in preference to mother's mother); *VV Narasimhaiah v CP Raju* AIR 1971 AP 134; *Radhabai v SK Mudaliar* AIR 1971 Mys 69; *Sunil Kumar v Satirani* AIR 1969 Cal 573; *Chander Prabha v Prem Nath* AIR 1969 Del 283; *Madhubala v Arun Khanna* AIR 1987 Del 81; *Kamalamma v Laxminarayan* AIR 1971 Mys 211 (mother was not appointed); *Gheesi v Shri Rama* AIR 1972 Raj 236; *Rema Vaid v Ram Vaid* AIR 1982 Mad 81 (mother leaving custody of child with father—petition after three years); *Sardar Bhupendra Singh v Jasbir Kaur* AIR 2000 MP 330 (mother given custody); *Kumar Jahagirdar v Chetna* AIR 2004 SC 1525 (Custody to remarried mother, welfare important not pleasure of parents)

The father is the natural guardian of his children during their minorities, but this guardianship is in the nature of a sacred trust, and he cannot, therefore, during his lifetime, substitute another person to be the guardian in his place. He may, in the exercise of his discretion as guardian, entrust the custody and education (subject to the mother's right to custody of a child of tender years) of his children to another. The authority he may thus confer, would be a revocable authority, and if the welfare of his children requires it, he can take such custody and education once more into his own hands, notwithstanding any agreement or arrangement to the contrary made by him. However, if the authority has been acted upon in such a way as in the opinion of the court, exercising its jurisdiction over infants, to create associations or to give rise to expectation on the part of the children which it would be undesirable in their interest to disturb or disappoint, the court will interfere to prevent its revocation.²³

A question of some importance touching an order of a foreign court regarding custody of a minor child and conflict of laws arises at times in an application to a court in India for custody of the minor who has been removed from the jurisdiction of the foreign court and brought into India. In a case recently decided by the Supreme Court where the mother had been awarded custody of the minor son by a court in England and the father had removed the boy thereafter to India, the custody of the son was ordered to be handed over to the mother. The observations of the court on the question of conflict of laws will be found useful.²⁴

CLAUSE (B)

This clause affirms the rule of Hindu law that the mother is the lawful guardian of her illegitimate children;²⁵ it however, lays down that the father of such children has no preferential right and is the natural guardian only after the mother.

CLAUSE (C)

This clause affirms the rule of Hindu law that the husband is the lawful guardian of his minor wife.²⁶

DISQUALIFICATIONS

The proviso to the section enacts that no person (father, mother or husband) is entitled to act as the natural guardian of a minor under the provisions of

23 *Besant v Narayaniah* AIR 1914 PC 41. The court may, of course, permit revocation of the entrustment if it is in the interest of the minor; *Sheokumar v Shiv Rani* AIR 1966 MP 189.

24 *Surinder Kaur v Harbax Singh* AIR 1984 SC 1224.

25 See § 522 (Vol I).

26 See § 443 (Vol I).

this section: (i) if he has ceased to be a Hindu by conversion to any other religion;²⁷ or (ii) if he has completely and finally renounced the world by becoming a hermit or an ascetic.

STEP-FATHER; STEP-MOTHER

A stepfather or a stepmother is not the natural guardian of the minor child. The position of an adoptive father or adoptive mother is, however, different, as will seen from the next section.

NATURE OF PROCEEDINGS

It has been stressed time and again that the interests of the child are paramount and that no technicalities can be allowed to override such paramount consideration. Keeping this in view, it has been held that even a petition under art 226 of the Constitution, for a writ of *Habeas Corpus* for custody of a child is maintainable and that the remedy under this Act is no bar to the institution of writ proceedings of the nature indicated above.²⁸ It has also been held that illegal confinement is not a *sine qua non* for exercise of powers under art 226, the primary consideration being the welfare of the child.²⁹

There is however, a divergence of views on this point.³⁰ The visitation rights can be moulded by the court under its directions, the welfare of the child being the paramount consideration.³¹

7. Natural guardianship of adopted son.—The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

GUARDIANSHIP OF ADOPTED SON

This section adopts the rule of Hindu law that guardianship of an adopted son who is a minor, passes on his adoption from his natural father and mother to his adoptive father and mother.³²

27 Other than Hinduism, Jainism, Sikhism or Buddhism; *Vijayalakshmi v Inspector, Karur Police Station* AIR 1991 Mad 243 (father converting to Islam, ceases to be a natural guardian).

28 *Ravi Keshri v Krishna Gupta* AIR 1993 All 230.

29 *Dakshaben v Dineshbhai* (1991) 32 (2) Guj LR 1023 (in the facts of both cases however, custody was declined).

30 *B Vasanthi v Bakthavatchalu* AIR 1993 Mad 322 (no interference under art 226 as alternative remedy is available); but see *Elizabeth Dinsshaw v Arund Dinsshaw* AIR 1987 SC 3, under the Guardian and Wards Act, which states that welfare of minor is predominant. Also see *Sanju v Sobhanath* AIR 1995 All 90.

31 *Paramjit Singh v Prabjot Kaur* AIR 2004 Del 318 (visitation rights can be moulded).

32 See § 521 (Vol I).

GUARDIANSHIP OF ADOPTED DAUGHTER

This section speaks only of the natural guardianship of an adopted son and does not refer to an adopted daughter. The Act came into force before the passing of the Hindu Adoptions and Maintenance Act 1956, and the general Hindu law as administered by the courts did not recognise any adoption of a daughter. The Hindu Adoptions and Maintenance Act now recognises adoption of a daughter and confers that right both, upon a male Hindu as well as a female Hindu.³³ The wish of a minor as regards custody can be taken into consideration.³⁴ Section 12 of that enactment rules that an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption, and from such date, all the ties of the child in the family of his or her birth, shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. There are exceptions to the application of this legal fiction but they do not touch the question of guardianship. The effect of that section would seem to be that the adoptive father and the adoptive mother would be regarded as the natural guardians of the adopted child in consonance with the rules relating to the law of adoption laid down in that Act.

8. Powers of natural guardian.—(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the Court,—

- (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor or
- (b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

³³ Section 7.

³⁴ *Buta Ram v Veeru Ram* AIR 2001 P&H 127 (minors, wishes in custody considered)

(5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the Court under sub-section (2) in all respects as if it were an application for obtaining the permission of the Court under section 29 of that Act, and in particular—

- (a) proceeding in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;
- (b) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and
- (c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the Court which appears ordinarily lie from the decisions of that Court.

(6) In this section, 'Court' means the City Civil Court or District Court or a court empowered under section 4A of the Guardians and Wards Act, 1890 (8 of 1890), within the local limits of whose jurisdiction the immovable property in respect of which the applications is made is situate, and where the immovable property is situate, within the jurisdiction any portion of more than one such Court, means the Court within the local limits of whose jurisdiction any portion of the property is situated.

POWERS OF NATURAL GUARDIAN

The powers of a natural guardian under Hindu law as hitherto applied have been dealt with in §§ 528–31 (Vol I). The rights of a natural guardian, as must have been seen from § 528, could mortgage, charge, sell or otherwise dispose of the immovable property of the minor, even without the sanction of the court, provided the alienation or any other dealing with such property by the guardian was for the benefit of the minor's estate. Reference has been made to the subject in the Introductory Note to the commentary on this Act and as already pointed out, the powers of the natural guardian in the matter of dealing with the immovable property of the minor, were not affected by the limitations enacted in s 29 of the Guardians and Wards Act which relate to a guardian appointed or declared by the court. Sub-section (1) of the present section lays down the rule relating to the general powers of a natural guardian in language which is *in pari materia* with that in s 27 of the Guardians and Wards Act. Reference may be made to cases decided under s 27 of the Guardians and Wards Act.

The powers of a widow to deal with the property in her hands as a

natural guardian of her female children and in the absence of a male member have to be examined in the light of the provisions of this section as also in conjunction with the powers of a *karta* or manager of a coparcenary. As is well-established, to constitute a joint family, the existence of at least one male member is essential, but in the absence of a male member, or even a minor male member, the property cannot be said to be a coparcenary property, since a widow along with her minor daughters cannot constitute a coparcenary or a joint family. A joint family can exist only if there is at least one male member and not otherwise. If the mother is to act as a guardian as regards joint family property, the existence of a male member is essential. Even a minor male member can be construed as a *karta* of the joint family property and the mother being the natural guardian of the minor, the *karta* can act as the natural guardian so as to bind the interests of the members. In the absence of a male member, however, the widow cannot alienate the property so as to bind the interests of the minor daughters who have succeeded to the property to the extent of their shares by virtue of the provisions of the Hindu Succession Act. Therefore, in the absence of any male members, the question of the property retaining the character of joint family property cannot arise, and the provisions of this section would come into operation, the widow not being qualified or entitled under the law to act as *karta*, since it is clear that the widow not being a coparcener, cannot act as such.

For a detailed analysis, refer to the decision in the case of *Mangala v Jayabai*.³⁵

As to limitation for a suit by a quondam minor challenging the transfer of immovable property by his natural guardian in contravention of sub-ss (1) and (2), see the under mentioned case.³⁶

MINOR'S ESTATE

The section deals with the 'minor's estate' or the 'immovable property' of the minor. It can apply to definite property of which the minor is the owner. There is a consensus of opinion that the section cannot apply to any undivided interest of the minor in any joint family property as a coparcener. It does not affect the right of the manager or *karta* of the joint family who can alienate joint family property so as to bind the interest of the minor coparcener, provided the alienation is for legal necessity, or for the benefit of the estate.³⁷ This view, taken by several high courts, has however been

³⁵ AIR 1994 Kant 276.

³⁶ *Subha Singh v Pritam Singh* AIR 1983 P&H 114 85 (article 60 which prescribes a period of three years is applicable).

³⁷ *Subramaniam v Krishnaswami* AIR 1972 Mad 377; *Arun Kumar v Chandrawati* AIR 1978 All 221; *Sakharam v Sheria* (1974) ILR Bom 1113; *Sumanmani Devi*

continued on the next page

dissented from by the Madras High Court where it has been held that such interest is also within the scope and ambit of this section and the same can be set aside if it is effected without prior permission of the court,³⁸ with the Supreme Court now holding, that the provisions of this section are not attracted in case of a *karta* of a joint family who disposes of the undivided interest of a minor, in view of the explicit terms of ss 6 and 12, this section is not attracted, since the joint family is capable of acting through the *karta*. The above controversy is now set at rest.³⁹ Thus, in view of the above decision, the view of the Madras High Court is incorrect and those of the Karnataka, Gujarat, Rajasthan and Orissa High Courts lay down the correct view.

Reference may be made to s 12 *infra* and notes thereunder.

Acquisition of property for minor

A natural guardian can acquire property for the benefit of the minor and the court can in a proper case even grant specific performance of a contract to purchase immovable property by the guardian on behalf of the minor. Permission of the court is not necessary for entering into any such agreement of purchase.⁴⁰

PERSONAL COVENANT

In numerous cases which were considered under the Guardians and Wards Act and particularly, s 27 of that enactment, it was held that although it was within the competence of a guardian to bind the minor's estate by contracts entered into for the purpose of realisation, protection or benefit of the estate, the guardian had no power to bind the minor by personal covenant.⁴¹ The position under Hindu law has already been pointed out.⁴² Sub-section (1) of the present section expressly rules that the natural guardian can in no case bind the minor by any personal covenants. Reference may be made to cases on the subject decided under s 27 of the Guardians and Wards Act. In the undermentioned case, the Supreme Court reviewed the decisions on the subject and held that it cannot be said in the case of a contract for

v Babaji Das AIR 1974 Ori 184 (joint family of mother and son); *Nathuni Mishra v Mahesh Mishra* AIR 1963 Pat 146. See notes under s 6 and s 12 (mother acting as natural guardian can alienate minor's interest without permission of the court). *Girdhar Singh v Anand Singh* AIR 1982 Raj 229; *Gangoji Rao v Channappa* AIR 1983 Kant 222; *Re Krishnakant* AIR 1961 Guj 68; *Narayan Gilankar v Udayakumar* AIR 1994 Bom 152.

38 *Dhanasekaran v Manoranjithammal* AIR 1992 Mad 214 (case law discussed).

39 *Narayanbal v Sridhar Sutar* (1996) 8 SCC 54.

40 *Than Singh v Barelal* AIR 1974 MP 24. See notes under sub-s (2).

41 *Darbara Singh v Kaminder Singh* (1979) 81 PLR 367 (even if actual possession is delivered).

42 § 529 (Vol I).

purchase of property by a guardian, that in seeking specific performance of the contract, the guardian would be binding the minor by a personal covenant. Such a contract is enforceable.⁴³

SUB-SECTION (2): LIMITATION OF POWERS OF NATURAL GUARDIAN

The effect of this sub-section read with s 5 of the Act is to supersede the law relating to the powers of a natural guardian in the matter of disposal of the immovable property of the minor hitherto applied in case of a Hindu minor. It is now laid down in express and explicit terms that the natural guardian cannot, without the previous sanction of the court, mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; nor can he, without such previous sanction, lease any part of such property for any term exceeding five years or for a term extending more than one year beyond the date on which the minor attains majority. A minor whose properties are alienated, and wishes to repossess them, must pray to set aside the sale effected without the prior sanction of the court.⁴⁴ Application for the sanction of the court cannot be made by an intending purchaser or other transferee; only the natural guardian would have to apply for sanction.⁴⁵ Even in respect of an agreement by a natural guardian which is within his or her competence and for the benefit of the minor, the legal position is that such an agreement is enforceable only upon a previous permission being obtained from the court. The decree in any such case must direct the natural guardian to seek the necessary permission from the court as contemplated by the section.⁴⁶

When a minor filed a suit against his guardian on attaining majority, but did not pray for setting aside the sale, and such a prayer was sought to be made subsequently after a lapse of three years of attaining majority, the suit would be barred by limitation.⁴⁷

For purchase of property for a minor, no permission of the court is necessary. The court can enforce specific performance of any such agreement by the natural guardian (mother) where it is satisfied that the purchase is for the benefit of the minor having regard to all the facts and circumstances

43 *Manik Chand v Ramachandra* AIR 1981 SC 519; *Roomal v Srinivas* AIR 1985 Del 153; *Mukesh v Deonarayan* AIR 1987 MP 85 and cases cited therein *Murlidhar v Yallappa* AIR 1994 Bom 358.

44 *Ramdas Menon v Sreedevi* AIR 2004 Ker 126 (FB) (case law discussed).

45 *Shivamurthi v Vijayasing* AIR 1972 Bom 152.

46 *Biswanath Charit v Damodar Patra* AIR 1982 Cal 199; *G Annamalai Pillai v Dist Revenue Officer* AIR 1985 Mad 357 (avoidance of lease deed effective from date of transaction); *Chandnee Vidyavati Madden v Kotial (Dr)* AIR 1964 SC 978 (sub-s (2) relates to immovable property of the minor; as to minors interest in joint family property, see notes supra).

47 *Vishwambar v Laxminarayana* AIR 2001 SC 2607.

of the case.⁴⁸ However, see the comment in this footnote. When, however, the very existence of a minor is in doubt, due to a discrepancy in the date of birth, at the time that a sale purportedly took place, such sale could not be challenged or set aside.⁴⁹ See notes under 'Acquisition of property for minor' *supra* and decisions thereunder.

As to filing a suit against a tenant by the mother of a minor as his next friend when the father is alive, see the undermentioned case.⁵⁰

SUB-SECTION (3)

This sub-section is a corollary to the limitations enacted in sub-s (2). Any dealing by a natural guardian with the immovable property of the minor, in contravention of the rule laid down in sub-s (2) is not binding on the minor. Any transfer prohibited by this sub-section can be avoided by the minor and it is not incumbent on the minor to file a suit simply for the purpose of avoiding the same.⁵¹

The rule is enacted for the benefit and protection of the minor. Any such transaction in contravention of the provisions of this sub-section is, however, not void, for in such a case, the minor may lose the benefit of the same even if it was to his advantage, but is only rendered voidable at his instance and the minor may, therefore, repudiate it or adopt it if he so chooses.⁵² The transferee cannot resist such repudiation by showing that the transfer was for the benefit of the minor or by relying on the doctrine of part performance.⁵³

The expression 'any person claiming under him' in this sub-section includes a transferee of the minor and such transferee can avoid the alienation by the natural guardian as visualised in this sub-section.⁵⁴

There was a divergence of views of different High Courts as regards the authority of the transferee for setting aside the sale by such person. The expression 'any person claiming under him' has now been interpreted,⁵⁵ and

48 *Radbeyshyam v Kiran Bala* AIR 1971 Cal 341; *Than Singh v Barelal* AIR 1974 MP 24. In *Chater Bhuj v Gurpreet Singh* AIR 1983 P&H 406, it was held that the minor was effectively represented in a suit for specific performance against the minor if sanction was given under this section, though the natural guardian had not formally been appointed guardian *ad litem* of the minor. This decision was however, overruled and it held that the suit proceedings were bad since a guardian had not been formally appointed under O 32, r 3 of the Code of Civil Procedure 1908; *Gurpreet Singh v Chatterbhuj Goel* AIR 1992 P&H 95 overruling *Chater Bhuj v Gurpreet Singh* AIR 1983 P&H 406.

49 *R Muraliraj v R Ramaraj* AIR 2001 Mad 208.

50 *K Kumar v Onkar Nath* AIR 1972 All 81.

51 *Santha v Cherukutty* AIR 1972 Ker 71.

52 *Kamarsu Rao v Nagabhushanam* AIR 2001 AP 531.

53 *Darbara Singh v Karminder Singh* AIR 1979 P&H 215.

54 *Amirtha v Sornam* AIR 1977 Mad 127 (FB).

55 *Amirtham Kudumbab v Sarnam* AIR 1991 SC 1256.

it is now settled that even a transferee falls within the clause 'any person', and can apply for setting aside such sale. The Supreme Court approved the views expressed by the Madras High Court and overruled the decision of the Bombay, Calcutta and Madras High Courts.⁵⁶

In the undermentioned case, it has been held that an alienation by a de facto guardian being void under s 11 and not merely voidable, it cannot be ratified by the minor on attaining majority.⁵⁷

SUB-SECTIONS (4) AND (5): SANCTION OF COURT: PRACTICE

Sub-section (4) lays down the rule that the power vested in the court, to sanction any mortgage, charge or transfer of any immovable property of the minor or any lease of such property for a term longer than that mentioned in cl (b) of sub-s (2), is to be exercised only if it is satisfied that creation of such mortgage, charge, transfer, or lease is a matter of necessity or to do so is to the evident advantage of the minor. The language of this sub-section is *in pari materia* with that in sub-s (1) of s 31 of the Guardians and Wards Act. Sub-sections (4) and (5) have to be read together. Sub-section (5) rules that any application for such sanction by the court under the present section shall be disposed of as if it were in all respects an application under sub-s (2) of s 29 of the Guardians and Wards Act. Sub-sections (2)–(4) of s 31 of the Guardians and Wards Act, contain rules which lay down the practice to be followed by the court before granting such sanction and the conditions which the court may in its discretion impose in case of any such proposed disposal of the minor's immovable property. Sub-sections (2)–(4) of that section are as under:

(2) The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the court may see fit to attach to the permission; and it shall be recorded, dated and signed by the judge of the court with his own hand, or, when from any cause he is prevented from recording the order with his own hand, shall be taken down in writing from his dictation, and be dated and signed by him.

(3) The court may, in its discretion, attach to the permission the following among other conditions, namely:

- (a) that a sale shall not be completed without the sanction of the court; or some person specially appointed by the court for that

⁵⁶ The above decision approves the view in *Palaniappa v Nallappa* AIR 1951 Mad 81; *P. Kamaraju v C. Gunaya* AIR 1924 Mad 322 and overrules the decisions in *Jhaverbhai v Kabhai Bechar* AIR 1933 Bom 42; *Man Mohan Battacharjee v Bidhu Bhushan* AIR 1939 Cal 460; *Palani Goundan v Vanjiakkal* AIR 1956 Mad 476.

⁵⁷ *Talari Erappa v Muthyalappa* AIR 1972 Mys 31.

purpose, at a time and place to be specified by the court after such proclamation of intended sale as the court, subject to any rules made under this Act by the High Court, directs;

- (b) that a lease shall not be made in consideration of a premium or shall be made [on] such terms of years, and subject [to] such rents and covenants, as the court directs;
- (c) that the whole or any part of the proceeds of the act permitted shall be paid into the court by the guardian, to be disbursed therefrom, or to be invested by the court on prescribed securities or to be otherwise disposed as the court directs.

(4) Before granting permission to a guardian to do an act mentioned in section 29, the court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice thereof, and shall hear and record the statement of any person who appears in opposition to the application.

Clause (b) of sub-s (5) of the present section, in terms, states that in the matter of granting such sanction, the court must observe the procedure and can exercise the powers specified in the provisions of s 31 of the Guardians and Wards Act (set out above). Clause (a) of sub-s (5) of the present section in effect, incorporates the provisions of s 4A of the Guardians and Wards Act which inter alia empower the High Court to confer jurisdiction on subordinate judicial officers to dispose of any proceedings under the Guardians and Wards Act. Clause (c) of sub-s (5) of the present section relates to appeals from orders refusing sanction to a natural guardian in any application to the court as required by the present section when he wants to mortgage, charge or otherwise, transfer any immovable property of the minor or grant a lease of the same for a term longer than that mentioned in cl (b) of sub-s (2) on the ground that it is necessary to do so and that it is evidently to the advantage of the minor to do so.

SUB-SECTION (6): 'COURT'

This sub-section relates to the question of forum for an application for the requisite sanction of the court. The application may be made to a city civil court, or a district court, or a court empowered by the High Court or a court to which the matter is transferred under the provisions of s 4A of the Guardians and Wards Act. The application may be made to any of these courts within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situated; and if the property is situate, within the local limits of more than one such court, the application may be made to any of such courts.

The provisions of this section will not be attracted in cases of scheduled tribes in absence of notification as contemplated in s 3(2).⁵⁸

⁵⁸ *Jagannath Sabar v Gana Bewa* AIR 1990 Ori 164.

9. Testamentary guardians and their powers.—(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12)⁵⁹ or in respect of both.

(2) An appointment made under sub-section (1) shall have no effect if the father predeceases the mother, but shall revive, if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

TESTAMENTARY GUARDIANS AND THEIR POWERS

The right of a Hindu father to appoint a testamentary guardian of his minor children and the powers of such guardian under Hindu law as hitherto applied, have been dealt with in § 532 (Vol I). The rights of such testamentary guardian under that law as interpreted by the courts, were comparatively very wide. The testamentary guardian, as must have been seen from § 532, could deal with the minor's property, subject only to such restrictions as were imposed by the will. In the absence of any such restrictions, the exercised powers are similar to those of a natural guardian. The testamentary guardian could, therefore, in the absence of any restrictions in the will,

⁵⁹ *Re Krishnakant* AIR 1961 Guj 68.

mortgage, sell or otherwise dispose of the immovable property of the minor, even without the sanction of the court, provided the alienation or any other dealing with such property by the guardian was for the benefit of the minor's estate. Reference has been made to the subject in the Introductory Note to the commentary on this Act. The powers of testamentary guardian under the Guardians and Wards Act are only subject to the restrictions imposed by the will, unless he is also declared to be a guardian by an order of the court. In the latter case, his powers are controlled by the relevant provisions of the Act. Section 28 of that Act is as follows:

Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise immovable property belonging to his ward, is subject to any restriction which may be imposed by the instrument, unless he has, under this Act, been declared guardian, and the Court which made the declaration, permits him, by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

In the undermentioned case, the court examined the relative jurisdictions under the present section (s 9) of this Act and s 7 of the Guardians and Wards Act 1890, and expressed the view that they are not inconsistent and that they operated in different fields.⁶⁰

The present section brings about some important changes in the law relating to testamentary guardians of a Hindu minor. The right of a Hindu father to appoint, by will, a guardian of the person as well as the property of his minor children is reiterated in sub-s (1). The position affecting the undivided interest of the minor in joint family property is different and no testamentary guardian can be appointed by the father of any such interest of his minor children (s 12). Sub-sections (2), (3) and (4) of the present section, relate to the rights of the mother to appoint a testamentary guardian of a minor child. Sub-section (5), which is the vital clause in this section, imposes the same restrictions on the powers of a testamentary guardian of a Hindu minor as are now by s 8 imposed on the powers of a natural guardian in the matter of dealing with and disposal of a minor's immovable property. The powers of a testamentary guardian are moreover, subject to the restrictions that may be imposed by the will. Sub-section (6) rules that the rights of a testamentary guardian of a minor girl cease on her marriage. After marriage, her husband becomes her natural guardian.

SUB-SECTIONS (1) AND (2)

Sub section (1) reaffirms the right of a Hindu father to appoint, by will, a guardian of his legitimate minor children in respect of the person as well

60 *Shoba v Janki* AIR 1987 MP 145.

as the property of such minor. Being the natural guardian of such children, he is entitled to exercise this power, unless he has become disentitled to act as the natural guardian of the minors by operation of the proviso to s 6 or any other provision of law which may disentitle him to act as such natural guardian, as for instance, where he is removed from guardianship by an order of the court. A father cannot, however, after the coming into operation of this Act, appoint a testamentary guardian for his minor children so as to exclude the mother from her right to act as the natural guardian of the children after the father [s 6(a)]. It will be seen from sub-s (3) that the present Act confers also on the mother in certain circumstances, the right to appoint a testamentary guardian of the minor children. Moreover, that sub-section gives full effect to the rights of the mother to act as the natural guardian of the minor children after the father, and rules that after the death of the father, she as a Hindu widow has the right to appoint, by will, a guardian in respect of the person as well as the property of the minor children. Sub-section (2) in terms, lays down the rule that an appointment of a testamentary guardian by the father, shall not have effect if the father predeceases the mother. In case the mother dies without appointing by her will, a guardian for the minor children, the appointment made by the father, in his will, is revived and such testamentary guardian will be entitled to act as the guardian of the minor children after the mother's death.

As to guardianship in respect of the undivided interest of a minor in joint family property, the position is different. The position under Hindu law as interpreted by the courts was not quite clear, though the preferable view was that the father had no power to appoint a guardian by his will of joint property [§ 532 (3)]. Sub-section (1) of the present section now expressly excludes the undivided interest of minor children in joint family property from its operation so that the father has no right to appoint, by his will, a guardian of the undivided interest of a minor in joint family property. Reference may also be made to notes under s 12, which rules that the court has no power to appoint a guardian for the minor in respect of such undivided interest where the property is under the management of an adult member of the family. This restriction on the powers of the court does not affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

SUB-SECTION (3)

The effect of this sub-section is to enlarge the rights of the mother who next to the father, is the natural guardian of the minor children. It is laid down in sub-s (2) that any appointment of a testamentary guardian by the father shall have no effect if he predeceased the mother with the result, that it is not now competent to the father by his will to appoint a testamentary guardian of the person and property of the minor children, so as to exclude

the right of the mother after the death of the father to appoint a guardian by will, in respect of the person as well as the property of the minor children [notwithstanding any appointment of a testamentary guardian that may have been made by the father [sub-s 2)]. A mother also has the right to act as the natural guardian of the minor children where the father has become disentitled (for instance, by ceasing to be a Hindu or renouncing the world) to act as the natural guardian of the children and the latter part of the present sub-section in terms, confers on her in such a case, the right to appoint a guardian, by will, in respect of the person as well as the property of the minor children. Under the law as previously applied, the mother had no right to nominate a guardian by will [§ 532 (1)].

SUB-SECTION (4)

Both, under the Hindu law as previously applied and under the present Act, the mother is the natural guardian of her illegitimate children [s 6 (b)] and it is only in case of the death of the mother or her becoming disentitled to act as such guardian, that the father can act as the natural guardian of his illegitimate children. The present sub-section rules that a mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian in respect of the person as well as the property of such children. The father has no right in any case to appoint a testamentary guardian of his illegitimate children. Reference may also be made to s 16 of the Hindu Marriage Act and the notes thereunder as to legitimacy of children of void and voidable marriage.

SUB-SECTION (5)

This is the vital clause in the section and materially affects the rights of a testamentary guardian of a Hindu minor as previously recognised under Hindu law and s 28 of the Guardians and Wards Act. Under the law as previously applied in case of testamentary guardians, the view was taken that the testamentary guardian derived his powers of management not only from the will of the father but also from the principle of Hindu law enunciated by the Privy Council in the case of *Hunooman Persad Pandey*⁶¹ and in several other later cases.⁶² Hindu law conferred on the guardian, not in his own interest but in the interest of the minor ward, comparatively large powers over even the immovable property of the minor under his management. Though a limited and qualified power to be exercised solely for the benefit of the minor's estate or in case of necessity, yet it was wide enough to include an authority to charge, mortgage or even sell a sufficient

⁶¹ 6 MIA 393.

⁶² *Ramanathan v Palaniappa* AIR 1939 Mad 531.

portion of it, if circumstances warranted the exercise of such power. It was held in cases under this head that where the will did not impose further restrictions or limitations on the exercise of this power in the matter of the disposal of the immovable property belonging to the minor, the testamentary guardian could alienate such property in case of need or for the benefit of the minor's estate. However, the power of a testamentary guardian is now controlled by the restrictions imposed by s 8(2) which requires the previous permission of the court inter alia for sale of any immovable property of the minor.⁶³

10. Incapacity of minor to act as guardian of property.—A minor shall be incompetent to act as guardian of the property of any minor.

INCAPACITY OF MINOR TO ACT AS GUARDIAN OF PROPERTY

This section lays down in express terms that a minor, that is a person who has not completed the age of 18 years [s 4(a)], is incompetent to act as guardian of the property of any minor. It supersedes to a large extent the rule laid down in s 21 of the Guardians and Wards Act. That section, by implication, recognises the right of a minor to act as the guardian of the property of his minor wife or child. That section also assumes by implication that a minor is competent to be the 'managing member of an undivided Hindu family' and that he is, as such manager, competent to be the guardian of the minor wife or child of another minor member of that family. It was observed in a decision of the Madras High Court:

It does seem anomalous that a minor could be the guardian of the person of his wife and children, that is entitled to the custody of their persons and the management of their properties while his own person is subject to the custody of the legal guardian of his person and his properties are under the management of the legal guardian of his properties.

It was suggested in that case that the right of a minor to act as a guardian should be confined to his wife and child, to the control of their persons and he should have no power to interfere with the management of their properties.⁶⁴ This section would seem substantially to adopt that suggestion.

⁶³ *Doraiswamy v E Balasubramaniam* AIR 1977 Mad 304.

⁶⁴ *Ibrahim v Ibrahim* (1916) 39 Mad 608, 614.

A Hindu minor, therefore, now has no capacity to act as the guardian of the property of any person. He can only act as the natural guardian of the person of his minor wife and children. This section, however, only postulates the competency of the minor to be the guardian of the property of any other minor. He can, therefore, be the *karta* and manager of a joint Hindu family. Section 21 of the Guardians and Wards Act is based upon that positive assumption.⁶⁵

11. De facto guardian not to deal with minor's property.—After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de facto guardian of the minor.

DE FACTO GUARDIAN

This section brings about a material change in the law relating to de facto guardians or de facto managers of a Hindu minor's estate by enacting in express terms that after the commencement of this Act, no person has the right or authority to do any act as a de facto guardian of such minor. Any act done by a de facto guardian or a de facto manager of a minor Hindu, before this Act came into operation, is not affected by the section and will be binding on the minor if it was for necessity or for the benefit of the minor's estate.⁶⁶ A person who is not an ad hoc guardian but manages the affairs of an infant in the same way as a de jure guardian does, can be described as a de facto guardian, although he is not a natural guardian or a testamentary guardian or a guardian appointed by the court. Strictly speaking, there is in law nothing like a de facto guardian. Although the expression has been used in a number of decisions of courts and the marginal note to this section, any such person who takes upon himself the general management of a minor may more appropriately be described as a de facto manager. The expression aptly describes the relations and friends who are interested in a minor who has no legal guardian and who, out of love and affection for him, assume superintendence and management of his estate. A de facto manager must be distinguished from a person who is in no way attached to the minor by any ties of affinity and is a mere intermeddler with his estate.⁶⁷ In *Hunooman Persaud Pandey's case*,⁶⁸ the Privy Council ruled that a de facto

⁶⁵ *Budhi Jena v Dhubai Naik* AIR 1958 Ori 7.

⁶⁶ See § 538 (Vol I).

⁶⁷ *Kondamudi v Myneni* (1949) 11 FCR 65, AIR 1949 FC 218, *Rajalakshmi v Ramachandran* AIR 1967 Mad 113, *Kusa Paridna v Baisbeh* AIR 1966 Ori 60.

⁶⁸ 6 MIA 393.

guardian had the same power of alienating the property of his ward as a natural guardian. The reasons for recognising the rule relating to the authority of a de facto manager of a minor's estate as also the demerits of the rule were discussed in a number of cases and by the Federal Court in *Kondamudi v Myneni*.⁶⁹ The present section now does away with the authority of any person to deal with or dispose of any property of a Hindu minor on the ground of his being the de facto guardian of such minor. It has accordingly been held that an alienee from a de facto guardian would now be governed by this section and any alienation so made after the commencement of this Act would be void *ab initio* and the alienee would not acquire any title to the property.⁷⁰ Nor can the minor, after coming into force of this Act, validate any such sale by ratification.⁷¹ All property of a minor is covered within the ambit of the section without any exceptions.⁷²

The inhibition applies to the separate property of a minor as also to the undivided share of the minor in joint family property.⁷³

This section clearly casts an embargo on the authority of a de facto guardian in dealing with the property of a minor. In the backdrop of the clear language of the provision, a question may however, arise as to whether it is necessary for a minor, on attaining majority to file a suit for a declaration that the transaction entered into by the de facto guardian during the minority of such a person was void?. A corollary question about the period of limitation, if such a suit has to be filed by the minor, would also arise. A learned single judge of the High Court of Gujarat had referred such a question to a Full Bench, for consideration. A mention as regards that case had been made in the earlier edition of this book. It had been opined that the minor would have to file a suit, even though the action of the de facto guardian was void. The Full Bench,⁷⁴ while considering the above issue, which pertained to a

69 *Kondamudi v Myneni* supra; *Rajalakshmi v Ramachandran* AIR 1967 Mad 113; *Kusa Paridna v Baisheb* AIR 1966 Ori 60.

70 *Daneyi Gurumurthy v Raghu Podhan* AIR 1967 Ori 68; *PT Chathu Chattiar v KK Kanaban* AIR 1984 Ker 118 (alienation of minor's share by mother acting as guardian—father alive and not disqualified); *Essakkyal Nadar v Sreedharan Babu* AIR 1992 Ker 200 (minor living with aunt who was not a guardian—aunt cannot alienate minor's property when father was alive and was not disqualified in law as the natural guardian); *Dhanasekaran v Manoranjithammal* AIR 1992 Mad 214 (this section is also applicable to joint family properties— such sale is voidable and not void) (case law discussed). This decision however, is no longer good law in view of the decision of the Supreme Court in *Sri Narayan Bal v Sridhar Sutar* (1996) 8 SCC 54; *Madhegowda v Ankegowda* AIR 2002 SC 215 (sisters act of sale held void).

71 *Talari Erappa v Muthyalappa* AIR 1972 Mys 31; *Kamamma v Appanna* (1973) 2 An WR 74 (grandmother); *Devineni v Swaramiah* (1976) 1 An WR 423 (mother, father alive); *Peethambaram v Lakshminarayana* (1978) 1 An WR 512 (separate property as well as undivided share in joint family property).

72 *Madhegowda v Ankegowda* AIR 2002 SC 215.

73 *Nandini v Lakshminarayan* (1978) 1 Andh Pra LJ 47.

74 *Jadav Parbhatbhai v Parmar Karsanbhai* 2001 (1) Guj LR 19 (FB), AIR 2001 Guj 118.

transaction of a period prior to coming into force of this Act, held that before the Act came into force, the position of a natural guardian and a de facto guardian was virtually identical except in certain respects. After the Act, however, there is a clear embargo on the de facto guardian dealing with the minor's property. If such a guardian however, dealt with the property of the minor, what would be the rights of the minor? The Supreme Court had in the case of *State of Punjab v Gurdev Singh*,⁷⁵ on a different set of facts, held that a void Act has to be set aside by a competent court for it to be held declared void. Taking into consideration the above decision, it may be stated thus:

Since the language of the section stipulates that the de facto guardian is not competent to deal with the property of the minor, if, despite the clear mandate of the legislature, such guardian deals with the property of the minor, the remedy for the minor would be to institute a declaratory suit for setting aside the sale and repatriation of the property, since the act would have a de facto operation unless it is set aside by a competent court. Such a suit would have to be instituted within a period of three years of the minor attaining majority. If the minor however, fails to institute the suit within three years of attaining majority, the title of the alienee-purchaser would be perfected, as held by the High Court of Gujarat.

The Supreme Court has held that such an invalid transfer is not required to be set aside by filing of a suit and that 'the minor on attaining majority can repudiate the transfer in any manner as and when the occasion arises'.⁷⁶

The Court has held that the minor can claim his right to the property by asserting his title and transferring his interest in the property. It is true that as a result of the embargo on a de facto guardian, any act of such person is invalid. A question, however, arises as to such repudiation being sufficient. Could a repudiation or assertion over the property repatriate the property to such a minor? The rights governing property are well established by legislation and judicial decisions. The owner of a property is entitled to its enjoyment and the rights that go with the ownership of property. In this view of the matter, can a mere repudiation help in safeguarding the minor's interest? Such an act of assertion is fraught with legal hurdles and would, in the opinion of the author, be inadequate in aiding the minor in enjoyment of the property. As held by the Supreme Court itself on numerous occasions, a void act has a de facto operation till it is set aside. This aspect has been adverted to herein above. Even though the section does prohibit the act of de facto guardians, such an act being invalid from its very inception, the transferee not getting a perfect title, it is enjoyment of property howsoever imperfect by the transferee. In order to reclaim the property for enjoyment

⁷⁵ *State of Punjab v Gurdev Singh* AIR 1992 SC 111

⁷⁶ *Madhagowda v Ankegowda* AIR 2002 SC 215.

by the minor, a suit, in the opinion of the author is necessitated, as a mere assertion based on the wording of the section is inadequate. Such assertion and dealing with the property by ignoring the transfer by the de facto guardian, would raise complicated legal conundrums which could easily be avoided by assertion through a suit. This would be in keeping with the decisions of the court as regards such a de facto act having a de facto operation till the time that it is set aside. In the opinion of the author, a suit is not an option but a necessity, and cannot be ignored by a mere assertion and dealing of property already in the hands of others as a result of even an invalid transfer.

References are invited to ss 6,8,27 and art 60 of the Limitation Act.

Reference may also be made to §§ 538 and 538A (Vol I).

12. Guardian not to be appointed for minor's undivided interest in joint family property.—Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest:⁷⁷

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

GUARDIAN OF MINOR'S UNDIVIDED COPARCENARY INTEREST

This section substantially reaffirms the law on the subject as previously interpreted by courts. If the minor is a member of a joint family governed by Mitakshara law, the father as *karta* and manager of the joint family is entitled to the management of the whole coparcenary property including the minor's interest. After the father's death, the management of the coparcenary property, including the minor's interest therein, passes to the eldest son as *karta*. The mother is not entitled to the custody of the undivided interest of her minor son in the joint property, because such property is not separate property, though she is, as a natural guardian, entitled to the custody of his person and of his separate property, if any. If all the coparceners are minors, the court may appoint a guardian of the whole of the joint property until one of them attains majority. On any one of the coparceners attaining majority, the guardianship of the property

⁷⁷ *Re Krishnakant* AIR 1961 Guj 68; *Dhanasekaran v Manoranjithammal* AIR 1992 Mad 214 (case law discussed). No longer good law in view of *Narayan Bal v Sridhar Sutar* (1996) 8 SCC 54.

constituted by the court ceases, and the court is bound to hand over the joint family property to the adult coparcener, notwithstanding the fact that there are other minor coparceners. The reason why a guardian cannot be appointed by the court of the undivided interest of a minor in coparcenary property, in cases governed by Mitakshara law, is that the interest of a member of a joint Mitakshara family is not separate or individual property. Such cases are governed by the general principles of the law relating to joint family property. The subject has been dealt with in §§ 519 and 536 (see Vol I). Reference may also be made to § 537 (Vol I) which deals with the inherent powers of a Chartered High Court in the matter of appointing guardian of a minor's undivided coparcenary interest in certain circumstances. The present section lays down in effect that the court cannot appoint a guardian of the undivided interest of a minor coparcener in the joint family property, where the property is under the management of an adult member of the family. This is, of course, subject to the proviso.

The High Court of Mysore did not have and does not have any jurisdiction to appoint a guardian for a Hindu minor in respect of his undivided interest in a joint family property, which is in the management of an adult member of the family.⁷⁸

As regards the power of a widowed mother to act as a manager of family property, in the absence of a male heir and when there are only female heirs, see the decision of the Karnataka High Court in *Mangala v Jayabai* in the commentary under s 8 supra.

13. Welfare of minor to be paramount consideration.—(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

WELFARE OF MINOR TO BE THE PARAMOUNT CONSIDERATION

The Act, as already pointed out, contains provisions which are supplementary to the law relating to guardians as laid down in the Guardians and Wards Act. It does not specifically deal with the question of the powers of the

⁷⁸ *Govindappa v Doddathayappa* AIR 1968 Mys 178

court to appoint or declare guardians or other questions relating to the general law on the subject of guardianship. Section 7 of the Guardians and Wards Act deals with the powers of the court to appoint guardians and s 17 states matters to be considered by the court in appointing guardians. Both the sections emphasise that the powers of the court are to be exercised for the welfare of the minor which should be the paramount consideration in the appointment and declaration of any person as the guardian of a minor. The present section does not lay down any new rule or principle but reiterates the salutary rule and is evidently intended to emphasise the importance of that general rule which is the keystone of the whole law on the subject. In all matters relating to the custody and upbringing of the minor as well as the administration and management of the minor's property, the primary and paramount consideration for the court must be the welfare of the minor. Reference may be made to notes under s 6 *ante*. Reference may also be made to the undermentioned decision of the Supreme Court.⁷⁹ Welfare of the minor is to be understood in the widest sense and would include the moral and religious welfare of the minor. This principle is firmly established.

This section makes it quite clear that in all cases, irrespective of the status of the person claiming guardianship (eg father), the welfare of the minor would be the paramount consideration and if necessary, s 19 of the Guardians and Wards Act will have to be read subject to this section.⁸⁰ Even in cases of serious marital discord, the welfare of minor children is paramount.⁸¹ The court, apart from awarding custody, can also regulate rights of visitation to spouses.⁸²

79 *Mobini v Virendra Kumar* AIR 1977 SC 1359 (mother appointed guardian of a son 11 years old, custody with mother); *Surinder v Harbax Singh* AIR 1984 SC 1224; *Balu Ram v Keshav Chand* (1977) 78 PLR 614 (boy aged 14 years—living with maternal grandparents—preference of minor); *Cf Sunita v Shyam Kali* AIR 1982 All 1; *Veena Agraval v Prahlad Das* AIR 1976 MP 92; *Gangabai v Bherulal* AIR 1976 Raj 153; *CS Reddy v Yamuna* AIR 1975 Kant 134; *Manju Tiwari v Rajendra Tiwari* AIR 1990 SC 1156; *Sardar Bhupendra Singh v Jasbir Kaur* AIR 2000 MP 330.

80 *Sunil Kumar v Satirani* AIR 1969 Cal 573; *Latta Prasad v Ganga Sahal* AIR 1973 Raj 93; *Venkatakrisnaiah v Sathiyakumar* AIR 1978 Kant 220; *Nirmal Jain v State* AIR 1983 P&H 120 (case law analysed).

81 *Sheela v Jivanlal* AIR 1988 AP 275 (custody of minors awarded to mother after second marriage to a Christian preceded by an ex-parte divorce with the first husband).

82 *N Nirmala v Nelson* AIR 2000 SC 3821.

THE HINDU ADOPTIONS AND MAINTENANCE ACT 1956

PRELIMINARY

1. Short title and extent	524
2. Application of Act	525
3. Definitions	526
4. Overriding effect of Act	527

ADOPTION

5. Adoptions to be regulated by this Chapter	530
6. Requisites of a valid adoption	532
7. Capacity of a male Hindu to take in adoption	533
8. Capacity of a female Hindu to take in adoption	535
9. Persons capable of giving in adoption	538
10. Persons who may be adopted	541
11. Other conditions for a valid adoption	544
12. Effects of adoption	549
13. Right of adoptive parents to dispose off their properties	557
14. Determination of adoptive mother in certain cases	558
15. Valid adoption not to be cancelled	561
16. Presumption as to registered documents relating to adoption	561
17. Prohibition of certain payments	563

MAINTENANCE

18. Maintenance of wife	564
19. Maintenance of widowed daughter-in-law	575
20. Maintenance of children and aged parents	578
21. Dependants defined	581
22. Maintenance of dependants	582
23. Amount of maintenance	586
24. Claimant to maintenance should be a Hindu	591
25. Amount of maintenance may be altered on change of circumstances	591
26. Debts to have priority	593

27.	Maintenance when to be a charge	593
28.	Effect of transfer of property on right to maintenance	594

REPEALS AND SAVINGS

29.	Repeals	595
30.	Savings	595

INTRODUCTORY NOTE



Adoption is the admission of a stranger by birth to the privileges of a child by a legally recognised form of affiliation. Amongst the ancient Greeks and Romans and some modern nations, adoption has been placed under legal regulation. Under Roman law, the effect of adoption was to create the legal relationship of father and son, just as if a person adopted were born of the blood of the adopter in lawful marriage. The adopted son took the name of this adopter, and was bound to perform his adoptive father's religious duties. *Arrogatio* under early Roman law had to be in accordance with prescribed formulae, and took place in public with the sanction of the people in *comitia curiata*.

ADOPTION IN HINDU LAW

Marriage and sonship constitute some of the unique chapters in the *litera legis* of ancient Hindu law which recognised 12 kinds of sons of which there were five kinds of adopted sons.

Modern Hindu law recognised the *aurasa* or legitimate son, begotten by the man himself by the lawfully wedded wife. Of the adopted sons, it recognised only two kinds, the *dattaka* and the *kritrima*. The *dattaka* form prevailed all over India; the *kritrima* form prevailed in Mithila and adjoining districts. It may also be of some interest to note that in ancient times, a daughter also could be adopted. Nanda Pandit in his *Dattaka Mimansa* has favoured adoption of a daughter, and regards it as conducive of spiritual benefit to the adopter and his ancestors. This is on the principle that a daughter given in marriage, which is called *kanyadana*, and a son given in adoption, which is called *putradana*, stand on the same footing being gifts for religious and secular purposes, and the same consideration should apply to the gift of a daughter in adoption in order to secure spiritual benefit to the donee through the adopted daughter's son. An outstanding feature of the Hindu Adoptions & Maintenance Act 1956 is that it recognises adoption both of a son and a daughter.

MAINTENANCE OF DEPENDANTS

The doctrine of maintenance has always been favoured by Hindu jurisprudence. Exponents of Hindu jurisprudence speak of and insist upon the maintenance and support of various members of the family, and lay down a number of beneficial injunctions. They draw a distinction between the dependants and lay down in a mandatory tone the rule that it is the duty of a man to support his wife, aged parents, and infant children. In case of other dependants, the injunctions are only preceptive. Modern Hindu law recognised the rule that a Hindu is under a legal obligation to maintain wife, minor sons, unmarried daughters and aged parents, whether he possesses any property or not. The obligation to maintain these dependants is personal in character, and arises from the very existence of the relationship between the parties. The present Act lays down mandatory rules for maintenance of the wife¹ on the same lines and imposes the duty of maintaining legitimate as well as illegitimate minor children, on both the parents.² It also imposes the duty of maintaining aged or infirm parents on both, a son and a daughter.³ The Hindu Succession Act 1956, now puts a son and a daughter at par in matters of succession and does not draw any distinction between male and female heirs. A logical corollary to the rights of women to be in *equali jura* is that the obligation of maintenance of certain close relatives should rest on male as well as female Hindus, and the estate of a deceased male as well as a female Hindu should be liable for maintenance of the dependants of such deceased person. 'Maintenance' is defined in a comprehensive manner and includes provisions for food, clothing, residence, education and medical attendance and treatment; in case of an unmarried daughter, it includes reasonable expenses incidental to her marriage.⁴

WIDE AND EXTENSIVE APPLICATION OF THE ACT

The Act applies not only to Hindus by religion, but to a wide category of persons including Jains, Sikhs, and Buddhists.⁵ It amends and codifies the law relating to adoptions and maintenance, and gives an overriding application to the provisions on the two subjects contained in it. In the law of adoption, it brings about some fundamental and important changes and the result is that immediately on the coming into operation of the Act, the law on the subjects of adoptions and maintenance hitherto applicable to Hindus, whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having force of law, ceases to have effect with respect to all matters

1 Section 18.

2 Section 20(2).

3 Section 20(3).

4 Section 3(b).

5 Section 2.

dealt within it. The Act also supersedes the rules on the subject of adoption and maintenance contained in any central or state enactment and any other law in force immediately before it came into operation, by enacting that all other law shall cease to apply to Hindus in so far as it is inconsistent with any provisions contained in the Act.⁶

SCHEME OF THE RECENT LEGISLATION

The present enactment is part of the scheme of codification of certain parts of Hindu law. The Hindu Marriage Act 1955, codifies the law on the subject of marriage and divorce; the Hindu Succession Act 1956, codifies the law relating to intestate succession; the Hindu Minority and Guardianship Act 1956, codifies certain parts of the law relating to minority and guardianship among Hindus; and the present enactment deals with adoptions and maintenance, two subjects which are not related to one another, but are presumably clustered solely to keep down the number of the new statutes forming part of the scheme of codification of Hindu law. It will be noticed that these four enactments leave an undetermined residue.

REQUIREMENTS OF VALID ADOPTION UNDER PREVIOUS LAW

The requirements of a valid adoption under the law applicable before the commencement of this Act as to the capacity of the parties was that the persons taking and giving a son in adoption must have the legal capacity and right to do so, and the person adopted should be lawfully capable of being taken in adoption. Only a male Hindu had the right to adopt a son provided he had no son, grandson or great-grandson, natural or adopted, living at the time of adoption. A wife could adopt a son to her husband, but she could not do so during her husband's lifetime without his express consent. After his death, she could adopt a son to him, in certain parts of India, only if he had expressly authorised her to do so. In other parts of India, she could adopt without such authority. However, in no case could a wife or a widow adopt a son to herself; the adoption had to be made to her husband. An adoption by a woman married or unmarried, of a son to herself was invalid and conferred no legal rights upon the person adopted. A daughter could not be adopted by a male or a female Hindu. The physical act of giving was a prime necessity of the ceremonial requirements relating to adoption. As to *datta homam*, that is, oblations of clarified butter to fire, the law was not finally settled, and there was divergence of judicial opinion. On the question of capacity to adopt also there was some difference of opinion on certain aspects of the matter. The law as to adoption by a widow,

⁶ Section 4.

and her authority to adopt was different in different states. On this and a number of other questions relating to the requirements of a valid adoption, the law was not uniform, and it was eminently desirable that the law on the subject should be uniform and comprehensive and contained in a series of coherent propositions carefully considered and authoritatively stated by the supreme legislature.

WOMAN TREATED AS IN *EQUALI JURA*

With the passing of the Hindu Succession Act 1956, which treats sons and daughters equally in the matter of succession, it was only logical that the fundamental guarantee of equality of status and equality before the law should be recognised also in the matter of adoptions, and concrete shape should be given to the rights of women to be *in equali jura* in this branch of law. The Act now provides for adoptions of boys, as well as girls. The law on the subject of adoption by a widow, as interpreted by courts, had the effect of divesting certain estates already vested in others, and had been the cause of much ruinous litigation. A widow can now adopt a son or daughter to herself, in her own right, but there is no question of divesting any property vested in any person or even herself by reason simply of the fact that subsequent to such vesting, an adoption has been made. The present Act has considerably simplified the law on the subject. It has also the merit of giving a uniform code on the subject for the whole of India.

SCHEME OF THE CHAPTER ON ADOPTIONS

Chapter II of the Act codifies the law of adoption and contains a fasciculus of rules relating to the capacity and right of a male and female Hindu to take in adoption a son or daughter who must be a 'Hindu', an expression to be understood in the wide comprehensive meaning given to it in the Act. It also deals with the subject of persons who may give in adoption, and persons who may be taken in adoption. One principal provision of the chapter relates to the formal and ceremonial requirements of the act of adoption. It is made abundantly clear that all adoptions made after the Act came into operation are to be regulated and governed by the provisions contained in the chapter, and that any adoption thereafter made in contravention of any of those provisions would be null and void.⁷ An adoption, which is void, does not affect the status or rights of any of the parties.⁸ It creates no rights in favour of the adoptee boy or girl in the adoptive family. Nor does the adoptee lose any rights in the family of his or her birth. Adoptions made prior to the coming into force of the Act, i.e. on 21 December

7 Section 5(1).

8 Section 5(2).

1956, are not affected by the rules relating to the validity and effect of adoptions contained in this Act. Their validity and effect must be determined by the law as it stood before the Act came into operation.⁹

REQUIREMENTS OF A VALID ADOPTION UNDER THE ACT

The requirements of a valid adoption under the Act are:

- (i) the person adopting must have the right to take and be lawfully capable of taking a son or daughter in adoption (ss 7–8);
- (ii) the person giving in adoption must be lawfully capable of doing so (s 9);
- (iii) the person adopted must be lawfully capable of being taken in adoption (s 10);
- (iv) the conditions relating to adoption including actual giving and taking of a child with the intention of transferring the child from the family of its birth must be complied with (s 11).

CAPACITY OF A MALE HINDU TO ADOPT A SON AS WELL AS A DAUGHTER

Every male Hindu who is of sound mind, and has attained majority by completing the age of 18 years may lawfully take a son in adoption, provided he has no Hindu son, grandson or great-grandson, natural or adopted, living at the time of adoption; and if he has a wife living, he can adopt only with her consent, unless on account of mental incapacity she is unable to give consent, or has disabled herself from giving requisite consent by renouncing the world or ceasing to be a Hindu. Similarly, every male Hindu who is of sound mind and has attained majority may lawfully take a daughter in adoption, provided he has no Hindu daughter or son's daughter (natural born or adopted) living at the time of adoption, and subject to the same requirements as regards the wife's consent.¹⁰

CAPACITY OF FEMALE HINDU TO ADOPT SON AS WELL AS A DAUGHTER

It is competent now under the Act to a female Hindu who is of a sound mind and has completed the age of 18 years to take a son or daughter in adoption to herself and in her own right. If she is married, she cannot adopt a son or daughter during the lifetime of her husband, unless the husband is of unsound mind or has renounced the world. A female Hindu who is

⁹ Section 30.

¹⁰ Sections 7, 11(i) and (ii).

unmarried or a widow or a divorcee has the capacity to adopt a son to herself, in her own right, provided she has no Hindu daughter or son's daughter living at the time of adoption.¹¹

WHO CAN GIVE IN ADOPTION

The capacity to give a son or daughter in adoption is principally confined to the father and the mother of the child, and even an only child may be given in adoption. One change brought about by the Act in matter of this requirement is that where both the parents are dead or disabled from exercising the right by reason of mental incapacity or renunciation of the world, the testamentary guardian or a guardian appointed or declared by the court can now give the ward in adoption, with the previous sanction of the court. No such sanction would be granted, unless the court is satisfied that the adoption will be for the welfare of the minor.¹² Now under this Act, even an only child can be given and taken in adoption.

PERSONS WHO MAY BE ADOPTED

The person to be adopted may be a male or a female. He or she must be a Hindu, and one who has not already been adopted, and must be unmarried, and must not have completed the age of 15 years. The last two requirements are not absolute in the sense that if there is a custom or usage applicable to the parties which permits a married person or a person who has completed the age of 15 years being adopted, the adoption of any such person will be valid.¹³ The same child cannot be adopted simultaneously by two or more persons.¹⁴ Some other conditions relating to the age of the child to be adopted are that in case of adoption by a male, the adoptee daughter must be at least 21 years younger than him;¹⁵ and in case of adoption by a female, the adoptee son must be at least 21 years younger than her.¹⁶

REQUISITE FORMALITY; GIVING AND TAKING

The physical act of giving and receiving of the boy or the girl is necessary to the validity of an adoption. Mere expression of consent or the execution

11 Sections 8, 11(i) and (ii), if she is adopting a daughter and has no Hindu son, son's son or son's son's son living at the time of adoption, if she is adopting a son.

12 Section 9.

13 Section 10.

14 Section 11(v).

15 Section 11(iii).

16 Section 11(iv)

of a deed of adoption, though registered, but not accompanied by actual delivery of the boy or the girl, does not operate as a valid adoption. To constitute an adoption, there should be some overt act which signifies the actual delivery of the child with intent to transfer the child from the family of its birth to the family of its adoption. Religious ceremonies are usually performed by making oblations of clarified butter to the fire (*datta homam*), but the Act does not insist upon the performance of this, or any other ceremony or form as essential to the validity of an adoption.¹⁷ The actual giving and taking of the child, however, is a requirement and a condition that is absolute. It is of the essence of adoption, and the law does not accept any substitute for it.

The object of adoption of a son was discussed by the *smritikars* and commentators. They have also been discussed in decisions of courts, and are twofold. The first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the *manes* of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name. The temporal purpose evidently is the celebrity of the name of the adoptive father who takes him as son for all purposes.

RESULT AND EFFECTS OF ADOPTION

The result and effects of adoption are notable. After stating the rules relating to capacity of the parties and the requirements of a valid adoption, the Act proceeds to lay down the effects and consequence of adoption. An adopted child is deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of adoption. From such date, all the ties of the child in the family of his or her birth become severed, and similar ties are replaced by those created by the adoption in the adoptive family.¹⁸ This fiction of law whereby a status is to be deemed to have been acquired and something is to be deemed to exist which would not otherwise have been so is to be given effect to with all its logical corollaries and all the incidents of the status. Full effect is to be given to the newly acquired status, for instance, in matters of succession *ex parte paterna* as well as *ex parte materna* in the family of adoption. One important result of the severance of the ties in the family of birth is that the adoptee can no longer claim any right to succeed to the property of his natural father or mother or any of the relations in the family of birth. There are, however, three vital qualifications to the logical effect and corollaries to the general rule that the adoptee is to be deemed for all purposes to be the son or daughter of the adoptive parent: (a) the adopted child is not divested of any property already vested in him or her before the adoption; (b) the adoptee cannot

17 Section 11(vi).

18 Section 12.

marry any person whom the adoptee could not have married, if he or she had continued in the family of birth so that even though the ties in the natural family are severed the bars relating to marriage within prohibited degrees of relationship and *sapinda* relationship in the family of birth continue to be applicable after the adoption; (c) the adopted child does not divest any person of any property which vested in him or her before the adoption.¹⁹ For all purposes, the adoption takes effect from the date of the adoption, and the vital nature and effect of this last rule cannot be minimised. The principle of divesting of vested estates in consequence of adoption had been the source of much ruinous litigation.

SOME OTHER RULES

The Act also lays down certain other rules to some of which reference may also be made here. No adoption which as has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce its status and return to the family of birth.²⁰ Another rule of some importance relates to proof. Where there is a registered document placing on record the factum of adoption, a presumption is to be raised that the adoption was made in compliance with all the requirements of law. The onus of proving invalidity of the adoption in any such case is on those who challenge the adoption.²¹

SCHEME OF CHAPTER ON MAINTENANCE

Chapter III of the Act codifies the law of maintenance applicable to Hindus. A Hindu is under a legal obligation to maintain his wife, minor sons, unmarried daughters, and aged parents. The obligation is personal. It arises from the very nature of the relationship that exists, whether he possesses any property or not. The Act gives statutory form to that obligation, and goes further than that and rules that a female Hindu, as well as a male Hindu is now under a legal obligation to maintain legitimate or illegitimate children, and aged or infirm parents. In the matter of persons who are entitled to claim maintenance under the Act, the scheme is to deal in the first place with the right of maintenance of wife from her husband;²² the right of maintenance of minor children (legitimate and illegitimate) from the father and mother;²³ and the right of maintenance of aged and infirm parents from their sons and daughters.²⁴ In these cases as also in case of a widowed daughter-in-law, the

¹⁹ Provisos to s 12.

²⁰ Section 15.

²¹ Section 16.

²² Section 18.

²³ Section 20.

²⁴ Ibid.

right is against an existing person, husband, father, mother, son, daughter or father-in-law, as the case may be. After stating the right of the wife, the minor children and others, the Act proceeds to define dependants of a deceased Hindu, and lays down rules relating to the right of maintenance of dependants from heirs of a deceased Hindu, or other beneficiaries who might have inherited the estate of such deceased person.

MAINTENANCE OF WIFE

Wife when Entitled to Separate Residence and Maintenance

The right of a wife for maintenance is an incident of the status of estate of matrimony, and a Hindu is under a legal obligation to maintain his wife. According to the law as applied before the Hindu Married Women's Right to Separate Residence and Maintenance Act 1946, the duty of the wife to live with her husband was emphasised with greater strictness and she had no right to separate residence or maintenance, unless she satisfied the court that the husband had refused or neglected to maintain her in his own place of residence or was guilty of such misconduct as justified her in living separate and apart from him. The Act of 1946 liberalised the law in certain respects in favour of the wife, and recognised wider grounds that could justify her claim for separate residence and maintenance. The present enactment lays down rules on the subject, which are substantially the same. A wife is entitled to live separately from her husband and claim maintenance from him: (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her; (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband; (c) if he is suffering from a virulent form of leprosy; (d) if he has any other wife living; (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; (f) if he has ceased to be a Hindu by conversion to another religion; (g) if there is any other cause justifying her living separately.²⁵ The Hindu Marriage Act 1955, also enables a wife in certain situations to claim separate maintenance, but she is not bound to adopt proceedings for and seek relief by way of judicial separation, or divorce or a decree for annulment of the marriage or even a decree for restitution of conjugal rights, and claim maintenance in those proceedings, although she may be entitled to do so. She may, if she so chooses, only claim separate residence and maintenance for herself, and is entitled to the same under the general law relating to maintenance now embodied in this Act.

25 Section 18(2).

MAINTENANCE OF CHILDREN AND AGED PARENTS

A Hindu male or female is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children, and his or her aged or infirm parents. The obligation on the person to maintain aged, infirm parents or an unmarried daughter, extends in so far as the parent or daughter is unable to maintain himself or herself out of his or her own property or earnings.²⁶ Section 19 of the Act states the circumstances in which a daughter-in-law is entitled to claim maintenance from her father-in-law.

MAINTENANCE OF DEPENDANTS OF DECEASED HINDU

The right of dependants of a male Hindu for instance a wife, minor children and aged parents, to be paid maintenance by him did not come to an end on his death and it was well-settled law that an heir was legally bound to provide, out of the estate which descended to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The right of a widow, when she did not succeed to her husband's property, was one of considerable importance and consequence. The position and rights of widow both under Mitakshara and Dayabhaga have been stated in the relevant chapter of this work. The rights of the widow—one of the three women mentioned in the Hindu Women's Rights to Property Act 1937—to claim maintenance, was not abolished by the Act in express terms, but the effect was that there was little occasion for her to claim maintenance since she was entitled to succeed as one of the preferential heirs along with the son, daughter, mother and other specified heirs, and the question of maintenance of a widow and other dependants of the deceased proprietor for instance unmarried daughter, mother or widowed daughter-in-law must now be considered in the context of the provisions of that Act. If her husband was at the time of his death a member of a Mitakshara coparcenary, the widow becomes entitled by operation of s 6 of that Act to share out of the interest of the deceased husband in the coparcenary property on the footing of a notional partition deemed to have taken place immediately before his death. The law on the subject of the rights of the dependants was fairly well-settled, but it was necessary that the law should be declared by the legislature in statutory form in view of the changes brought about by the Hindu Marriage Act 1955 and the Hindu Succession Act 1956.

PERSONS ENTITLED TO MAINTENANCE AS DEPENDANTS

The principal general rule laid down in the Act on this aspect of maintenance is that a dependant of a male or female deceased Hindu, who has not

²⁶ Section 20

obtained any share in the estate of the deceased, dying after the commencement of this Act, is entitled to claim maintenance from those who take the estate. Such, for instance, would be the case where a Hindu has disposed off his property by will and his dependants such as wife, children, or others have not been properly provided for. The dependants of a deceased Hindu entitled to claim maintenance as stated above are: (i) his or her father; (ii) his or her mother; (iii) his widow (so long as she does not remarry); (iv) his or her minor son; (v) the minor son of his predeceased son; (vi) the minor son of predeceased son of his predeceased son; (vii) his or her unmarried daughter; (viii) the unmarried daughter of his predeceased son; (ix) the unmarried daughter of a predeceased son of his predeceased son; (x) his widowed daughter; (xi) the widow of his predeceased son (so long as she does not remarry); (xii) the widow of a son of his predeceased son so long as she does not remarry; (xiii) his or her illegitimate minor son; (xiv) his or her illegitimate daughter (so long as she remains unmarried). As a rule it may be stated that this right of a dependant is enforceable when the dependant is unable to obtain maintenance from the estate of any other person when he or she has a prior right to claim maintenance as a dependant of such other person.

DISCRETION OF THE COURT

There is no yardstick and no rigid rule for assessment of the quantum of maintenance to be paid to any person entitled to the same, and the courts have always exercised a wide discretion in the matter. That discretion is, of course, exercised judicially in the light of established principles and upon an equitable view of all the circumstances attending each particular case. The Act lays down that it shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of the Act²⁷ and deals with the matter under two heads. In determining the amount of maintenance to be awarded to a wife, child or parent, regard must be had to: (a) the position of the parties; (b) the reasonable wants of the claimant; (c) if the claimant is living separately, whether the claimant is justified in doing so; (d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source; (e) the number of persons entitled to maintenance from the husband or father or mother or son or daughter, as the case may be.²⁸ In determining the amount of maintenance to be awarded to a dependent regard must be had to: (a) the net value or the estate of the deceased after providing for the payment of his debts; (b) the provision, if any, made under a will of the deceased in respect of the dependant;

²⁷ Section 23(1).

²⁸ Section 23(2).

(c) the degree of relationship between the two; (d) the reasonable wants of the dependant; (e) the past relations between the dependants and the deceased; (f) the value of the property of the dependant and any income derived from such property, or from his or her earnings or from any other source; and (g) the number of dependants entitled to claim maintenance under the Act.²⁹

SOME OTHER RULES

The Act also lays down certain other rules to some of which, reference may be made here. A dependant's claim for maintenance is not a charge on the estate of the deceased or any portion of the same, unless one has been created by the will of the deceased; a decree of the court; or, by agreement between the dependant and the owner of the estate of any portion of it.³⁰ Debts contracted or payable by the deceased take precedence over the right of maintenance of any dependant, unless there is a valid charge created in respect of the same.³¹ The amount of maintenance, whether fixed by a decree of the court or by agreement of any time, may be altered if there is a material change in the circumstances justifying such alteration.³²

²⁹ Section 23(2)

³⁰ Section 27.

³¹ Section 26

³² Section 25

THE HINDU ADOPTIONS AND MAINTENANCE ACT 1956



78 OF 1956

[21 December 1956]

An Act to amend and codify the law relating to adoptions and maintenance among Hindus

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows:

PREAMBLE

A preamble to an enactment of the legislature was formerly regarded as a key to open the mind of the makers of the Act, and the mischief which they intended to redress. The practice of inserting elaborate preambles in enactments of the legislature has disappeared and it is now regarded as well-settled law that a preamble cannot either restrict, or extend the enacting part which the language and scope of an Act are not open to doubt.

SCHEME OF CODIFICATION OF HINDU LAW

The present enactment deals with two subjects—adoption and maintenance. The enactment is part of the scheme of codification of certain parts of Hindu law. The Hindu Marriage Act 1955, codifies the law on the subject of marriage and divorce; The Hindu Succession Act 1956, codifies the law relating to intestate succession; The Hindu Minority and Guardianship Act 1956, codifies certain parts of the law relating to minority and guardianship among Hindus; and the present enactment deals with adoptions and maintenance, two subjects which have no real or practical connection and are not related to one another, but are clustered solely to keep down the number of the new statutes forming part of the scheme of codification of Hindu law. It will be noted that these four enactments leave an undetermined residue.

CODIFYING ACT

It is clear from the Preamble that it is intended by the Act not merely to amend, but to amend and codify the law relating to adoptions and maintenance. The object of codification of a particular branch of law is that, on any matter specifically dealt by it, such law should be sought of in the codified enactment itself. Where a statute is expressly said to codify the law, the court as a rule is not at liberty to go outside the law so created, simply because before the existence of the enactment, another law prevailed.

A question may arise whether this Act is a complete code in the sense of a comprehensive legislation dealing with every phase and aspect of the law of adoptions and maintenance. In an Act, instituted as an Act to amend and codify a particular branch or branches of law, in so far as there is express enactment, that alone must be looked at since the court is bound by it and can look to nothing else and the express enactment must govern the rights of the parties even though it has radically changed or altered or modified the prior law. The Act, as has already been pointed out, brought about some important changes in the law on the subjects of adoptions and maintenance previously applied to Hindus. Reference in this connection may be made to s 4, which gives overriding effect to the provision of the Act. It follows that with respect to matters for which provision is made in the Act, the prior law ceases to have effect to the extent laid down in that section. It also follows that in respect of matters for which no provision is made in the Act, the old law must continue to remain applicable, though such matters are indeed few.

RULES OF INTERPRETATION OF A STATUTE

For some of the rules relating to interpretation, see notes supra.

CHAPTER I

PRELIMINARY

1. Short title and extent.—(1) This Act may be called the Hindu Adoptions and Maintenance Act, 1956.

(2) It extends to the whole of Indian except the State of Jammu and Kashmir.

COMMENCEMENT AND EXTENT

The Act received the assent of the President on 21 December 1956 and came into operation on that day.¹

¹ General Clauses Act, s 5(1)(b)

The Act applies to Hindus in the whole of India, except the state of Jammu and Kashmir. It will be noticed that the Hindu Marriage Act 1955, states that it applies 'also to Hindus domiciled in the territories to which this Act extends who are outside the said territories'. The legislature has not provided in this section for extra-territorial application presumably on the ground that it was unnecessary and inappropriate to do so, and left the question to be dealt with by principles of international law. The general principle of private international law is that the law of domicile governs personal relations and the *lex loci* governs matters relating to immovable property.

2. Application of Act.—(1) This Act applies—

- (a) to any person, who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Parthana or Arya Samaj;
- (b) to any person who is a Buddhists, Jaina or Sikh by religion, and
- (c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is provided that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation.—The following persons are Hindus, Buddhists, Jainas or Sikhs by religions, as the case may be:

- (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
- (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;
- (bb) any child, legitimate or illegitimate, who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhists, Jaina or Sikh²; and
- (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Schedule

² The cl (bb) was inserted by Act 45 of 1962, s 62.

Tribe within the meaning of clause 25 of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(2A) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the Renoncants of the Union Territory of Pondicherry.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

PERSON GOVERNED BY THE ACT

It will be seen from § 6(1) (Vol I) that Hindu law has been applicable to a wide category of persons. The present section substantially codifies the law on the question as it existed at the time of the commencement of this enactment and it is *in pari materia* with the law on the question enacted in s 2(1)(c) of the Hindu Marriage Act 1955, and the analogous section of the Hindu Succession Act 1956.

Reference may be made to notes under 'Persons governed by the Act' supra. Reference may also be made to ss 6 and 7 (Vol I). Attention is also invited to s 2 of the Hindu Marriage Act and the notes and cases cited thereunder. When a marriage between a Hindu female and a man who has converted from Islam to Hinduism is solemnized as per Hindu rites, the parties are to be treated as Hindus.³

3. Definitions.—In this Act, unless the context otherwise requires,—

- (a) The expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

Provided that the rule is certain and not unreasonable or opposed to public policy: and

Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family:

- (b) 'Maintenance' includes—

- (i) in all cases, provisions for food, clothing, residence, education and medical attendance and treatment;
- (ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage;⁴

³ *Kanchan v Akash* AIR 2001 Del 318.

⁴ Reference may be made to *Commissioner of Gift tax v Bandi Subba Rao* (1987) 167 ITR 66.

- (c) 'minor' means a person who has not completed his or her age of eighteen years.

INTERPRETATION

It will be noticed that the definitions given in this section are not intended merely to economise words. Some of them lay down legal principles.

'UNLESS THE CONTEXT OTHERWISE REQUIRES'

The definitions given in this section have to be read subject to the qualification that their application must not be inconsistent with the context or subject matter. Even when an Act contains a section giving definition and interpretation, the latter may not be applicable in all the contexts. Where there is something repugnant in the context showing that the definition will not fit, the court will give such meaning to the expression as will be more in harmony with the context, and allow it to prevail over the 'artificial conceptions' of the definition clause.

CLAUSE (A): 'CUSTOM', 'USAGE'

(See notes, under s 3 of Hindu Marriage Act under 'custom': 'usage' and ss 16–20 (Vol I)). Reference may also be made to the *Haribai v Baba Anna*.⁵

CLAUSE (B): MAINTENANCE

The definition of 'maintenance' is so worded that it can be rendered applicable to the case of all persons entitled to claim maintenance under the various provisions of the Act. In case of an unmarried daughter, it includes both maintenance and reasonable expenses of and incidental to the marriage.

CLAUSE (C): MINOR

The expression 'minor', in the context of the provisions of the Act relating both to adoption and maintenance, is to be understood as referable to a person who has not completed his or her 18th year.

4. Overriding effect of Act.—Save as otherwise expressly provided in this Act,—

- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the

⁵ *Haribai v Baba Anna* AIR 1977 Bom 289.

- commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

OVERRIDING EFFECT OF THE ACT

Section 4 gives overriding application to the provisions of the Act and in effect lays down that in respect of any of the matters dealt with in the Act, it seeks to repeal all existing laws, whether in the shape of enactments or otherwise, which are inconsistent with this Act. The Act brings about some important changes particularly in the law of adoption and the result is that immediately on the coming into operation of the Act, the law of adoption and maintenance hitherto applicable to Hindus, whether by virtue of any text, rule or interpretation of Hindu law or any custom or usage having the force of law, ceases to have effect with respect to all matters dealt with in the Act. The Act also supersedes the rules of adoption and maintenance contained in any central or state enactment, and any other law in force immediately before it came into operation by enacting that all other law shall cease to apply to Hindus in so far as it is inconsistent with any provisions contained in the Act. Adoptions made after the commencement of the Act are to be regulated by the provisions of the Act. Section 5 in terms states that no adoption shall be made after the commencement of the Act by or to a Hindu, except in accordance with the provisions contained in chapter II, ss 5–17 (Vol I) and that any adoption made in contravention of those provisions shall be void. The Act, it will be noticed, does not recognise *Kritrima* adoption [§ 515, (Vol I)], nor *Dvyamushyayana* adoption [§ 486, (Vol I)], nor what is often referred to as *Illatom* adoption in certain communities in the south [§ 515A, (Vol I)]. No such adoption can be made after the Act came into force.

After the Act came into force there is no scope for making any customary adoption in Punjab.⁶

The Act is a codifying enactment. It does not merely crystallise or declare the existing law upon the two subjects of adoption and maintenance, but deliberately departs from the same in respect of certain matters. It supersedes prior law and lays down the whole law of adoption and maintenance in the form of a code and so far as it goes must be read as a complete enactment. Therefore, in cases governed by the Act, appeal to any rule of the law of adoption or maintenance, previously applicable to Hindus is permissible only in respect of matters for which no provision is made in the Act. A

⁶ *Kartar Singh v Surjan Singh* AIR 1974 SC 2161. Reference may be made to § 515 B (Vol I).

family, or caste custom prohibiting adoption would be overridden by this Act.⁷

It does not follow from what has been stated above that any provision relating to maintenance in the Act affects the court's power to grant permanent alimony and maintenance under s 25 of the Hindu Marriage Act.⁸

The Act does not repeal or affect in any manner the provisions of s 488 of the Code of Criminal Procedure 1973 relating to maintenance. The scope of the two laws is different and both can stand together.⁹ In the undermentioned case, it was held that this section did not bar the enforcement against the estate of a deceased Hindu of a right of maintenance created in favour of a mistress of the deceased under an agreement.¹⁰

ACT IS NOT RETROSPECTIVE IN ITS OPERATION

It is a fundamental and firmly established rule of interpretation that a statute which deals with rules of substantive law, shall not be construed to have retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary implication. There is a clear indication in this section read with the other important sections of the Act that it is not intended to have retrospective effect.¹¹ As to adoptions, s 5 expressly rules that adoptions made after commencement of the Act are to be regulated by the provisions of the Act. Section 30 which is evidently appended *ex abundanti cautela* states that nothing contained in the Act is to affect any adoption made before the commencement of the Act, and the validity and effect of any such adoption must be determined by the law as it stood before the Act came into operation. A contrary rule would obviously result in manifest injustice.

The general rule that an enactment like the present should operate in cases and in respect of facts which come into existence after it was passed—*nova constitutio formam imponere debet, non proeteritis*—has been accepted by the legislature, and the exceptions to its application in the Act are few. In *Gopala Rao v Sitharamamma*,¹² it was observed that where the Act is intended to be retrospective it expressly says so, and reference was made to certain provisions of the Act relating to maintenance. The word 'retrospective' is used in several different senses. A statute is 'not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing'. Thus, for instance in a case

7 See § 445 (Vol I) for such custom.

8 *Seshadri v Jayalakshmi* AIR 1963 Mad 283, (1963) ILR Mad 384.

9 *Nank Chand v Chandra Kishori* AIR 1970 SC 446 and cases examined therein.

10 *Subhaschandra v Narbadabai* AIR 1982 MP 236.

11 *Ramamoorthy v Sitharamamma* AIR 1961 AP 131; *Ramabai v Ambadas* AIR 1967 MP 86; *Danirajji v Vahuji Maharaj Chandraprabha* AIR 1975 SC 784.

12 *Gopala Rao v Sitharamamma* AIR 1965 SC 1970, 1973.

where some of the grounds on which maintenance may be claimed fall under chapter III (ss 18–28), a part of the requisite facts constituting the grounds may well be antecedent to the date of the commencement of the Act. In such a case, it cannot be said that by applying provisions relating to maintenance the court is giving retroactive operation to the Act. It may be said in case of any such new law, in general, that it confers new rights and it would not be strictly correct to say that there is retroactive operation.

A necessary and logical corollary to the rule that retrospectivity is not to be presumed is that even in case of a provision intended to affect existing rights, it is not to be construed to have any greater retrospectivity than is rendered necessary by the language used, unless to do so would result in absurdity or an anomalous situation. In these matters, the courts have been more guided by considerations of substantial justice and convenience, than rigid attention to strict grammatical form.

CHAPTER II

ADOPTION

In the Introductory Note to this commentary, reference has been made to the scheme of this chapter on adoption and an outline has been given of the principal provisions relating to requisites and conditions of a valid adoption, capacity to take in adoption, persons capable of giving in adoption, and persons who may be adopted. Attention has also been drawn in that note to the result and effect of adoption.

5. Adoptions to be regulated by this Chapter.—(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

ADOPTIONS MADE AFTER THE COMMENCEMENT OF THIS ACT

Sub-section (1) of this section makes it abundantly clear that all adoptions made after the Act came into operation are to be regulated and governed

by the provisions contained in this chapter (ss 5–17), and that any such adoption made in contravention of those provisions, would be null and void. (Reference may be made to notes under s 4).

ADOPTION MADE BEFORE THE COMMENCEMENT OF THE ACT

It follows from the rule laid down in sub-s (1) that the Act is not intended to deal with or affect adoptions made before the Act came into operation. Section 30 gives the express saving evidently appended *ex abundanti cautela* that nothing contained in the Act is to affect the validity and effect of any such adoption which must be determined by the law as it stood before the Act came into operation.¹³ A contrary rule would obviously result in manifest injustice. A void adoption which took place before the Act cannot be declared valid under this Act.¹⁴ The subject of adoption under the previous law is discussed in chapter XXIII (see Vol I).

SUB-SECTION (2): CONSEQUENCES OF A VOID ADOPTION

Sub-section (2) deals with the question of effect and consequences of an adoption made after the coming into force of the Act where such adoption, though performed, is void by operation of the requirements of the Act relating to the prescribed conditions for a valid adoption, capacity to take in adoption, capacity to give in adoption, or persons who may be adopted. The prime effect of a valid adoption is that an adopted child is deemed to be the child of his or her adoptive father or mother for all purposes from the date of the adoption, and all the ties of the child in the family of his or her birth become severed and replaced by those created by the adoption in the adoptive family as laid down in s 12. The present sub-section reaffirms the general rule of Hindu law that where there has been adoption in form, but such adoption is invalid, the adopted person does not acquire any rights in the adoptive family, nor does he forfeit his rights in his natural family. (Reference may be made to § 510 (Vol I)).

GIFT TO PERSON WHOSE ADOPTION IS INVALID

See § 511 (Vol I).

¹³ *Nathuni Prasad v Kacher* AIR 1965 AP 160.

¹⁴ *Tara Chand v Ram Autar* AIR 1975 P&H 20 (right of adopted son to challenge a gift).

6. Requisites of a valid adoption.—No adoption shall be valid unless—

- (i) the person adopting has the capacity, and also the right, to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

REQUIREMENTS OF A VALID ADOPTION

This section enumerates the requirements of a valid adoption: (1) The person adopting must have the right to take and be lawfully capable of taking a son or daughter in adoption (ss 7–8) ; (2) the person giving in adoption must be lawfully capable of doing so (s 9); (3) the person adopted must be lawfully capable of being taken in adoption (s 10); (4) the conditions related to adoption, including actual giving and taking of the child with intention of transferring the child from the family of its birth to the family of its adoption, must be complied with (s 11).

Failure of compliance with any of these requirements will render the adoption null and void. The section is of a mandatory character. The requirements are cumulative and must be complied with. The requirement about giving in adoption, by a competent person is applicable both, in case of a minor and an adult person who, where permissible by custom, may be adopted.¹⁵

Once adoption has taken place, the legal effects of such adoption cannot be avoided and the motive of taking into adoption has no relevance.¹⁶

The conditions as regards adoption contained in this chapter being satisfied, and all aspects as regards evidence and ceremonies being established, the adoption must be held to be valid.¹⁷ If, however, the other conditions enumerated herein are not satisfied, the adoption would not be valid.¹⁸ (See notes under s 11).

INTER-COUNTRY ADOPTION

This Act places the welfare of the child as the primary objective. This being the case, even change in the religion of the child as a result of inter-country

¹⁵ *Dhanraj v Suraj Bai* AIR 1975 SC 1103, confirming *Dhanraj v Suraj Bai* AIR 1973 Raj 7, also see notes under s 9 infra, and seen notes under s 10 infra.

¹⁶ *Devgonda Patil v Shamgonda Patil* AIR 1992 Bom 189.

¹⁷ *Chandan Bilasini v Aftabuddin Khan* AIR 1996 SC, *Pratapi v Balakrishna* AIR 1988 MP 125 (if all conditions satisfied, no bar to adoption by maternal grandparents).

¹⁸ *Sehati Baral v Dungal Baral* AIR 2000 Ori 158.

adoption, or cultural differences between the Indian culture and the culture of the adoptive country and the adoptive parents are placed in a position posterior to the welfare of the child. Such consideration aims at the primacy of the child always being predominant and anterior to any other.¹⁹ Requirement of a valid adoption under the previous law are stated in §§ 449–93 (Vol I).

7. Capacity of a male Hindu to take in adoption.—Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation.—If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary, unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

TAKING IN ADOPTION

Sections 7 and 8 deal with the subject of persons who may lawfully take a son or daughter in adoption, and the effect of these sections is to bring about important changes in the law on the subject of adoption. It is competent for a male Hindu to take a son or a daughter in adoption in the circumstances mentioned in s 7 and subject to the conditions stated in s 11. It is also competent now for a female Hindu to take a son or a daughter in adoption to herself, in her own right, in the circumstances mentioned in cl (c) of s 8 and in s 11 and subject to the conditions stated in s 11. Under the previous law, only a male could adopt a son. A wife could adopt a son to her husband, but she could not adopt during her husband's lifetime, except with his express consent. The law as to consent in case of adoption by her after his death differed in different states as summarised in § 452 (see Vol I). However, in no case could a wife or a widow adopt a son to herself; the adoption had to be made to her husband. An adoption by a woman of a son to herself was invalid, and conferred no legal rights upon the person adopted. A daughter could not be adopted by a male or female Hindu (§ 480(1), Vol I). The changes now made in the law on the subject require careful consideration.

¹⁹ *Jayantilal v Asha* AIR 1989 Guj 152.

CAPACITY OF A MALE HINDU TO TAKE IN ADOPTION

Any male Hindu who is of sound mind and is not a minor, provided that he has completed the age of 18 years, has the capacity to take a son or daughter in adoption. Adoption by a male Hindu who is himself a minor is void *ab initio* and cannot become valid by mere ratification. He may, however, after attaining majority, if possible, re-adopt the child in accordance with the conditions laid down in the Act. Adoption by a person of unsound mind is no adoption at all. A person who wants to challenge any adoption on the ground that the adoptive father was of unsound mind will have to discharge the heavy onus of proving that at the date of the adoption the adoptive father was of unsound mind. This requirement relating to mental capacity is a very simple one, which does not demand any high degree of intelligence on the part of the adoptive father to comprehend that he is adopting a son, and there is always a very strong presumption in favour of sanity. This burden of proof may, however, shift where it is shown, for instance, that the adoptive father had on inquisition been found to have been a lunatic.²⁰

CONSENT OF WIFE

The capacity of a male Hindu to adopt a son or daughter recognised by the section is circumscribed by the rule enacted in the proviso that in case he has a wife living, he has no right to adopt except with the consent of the wife. The consent need not necessarily be express. It can be inferred from the facts and circumstances of the case. Usually, where adoption ceremonies are performed, the wife has to take a prominent part in the same and no difficulty of proving consent should arise in practice. The consent may be dispensed with if the wife has finally renounced the world or has ceased to be a Hindu (by conversion to any religion other than Hinduism, Jainism, Buddhism or Sikhism) or if the wife is declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect. In case the male Hindu who wants to adopt a son or daughter, has more than one wife, the requisite consent must be obtained from all the wives, except that no consent would be necessary from a wife who is unable to give consent or has disabled herself from doing so in circumstances already stated above. This section has to be read in conjunction with s 8. The adoption of a boy by the senior widow would not be invalid in the absence of consent of the junior widow. Such adoption would not have the effect of divesting the junior widow of property vested in her.²¹

²⁰ *Gopi v Madanlal* AIR 1970 Raj 190

²¹ *Vijayalakshamma v B T Shankar* AIR 2001 SC 1424

It will be noticed that s 6(1) requires that the person who wants to adopt a son or daughter must have the capacity, and also the right, to take in adoption. The present section speaks of what is described as 'capacity'. Section 11, which lays down conditions for a valid adoption, requires that in case of adoption of a son, the adoptive father must not have a Hindu son, son's son or great-grandson (by legitimate blood relationship or by adoption) living at the time of adoption. Section 11 also requires that in case of adoption of a daughter, the adoptive father must not have a Hindu daughter or son's daughter (by legitimate blood or by adoption) living at the time of adoption.

A male Hindu competent to adopt a child does not lose his competency merely because he has a widowed daughter-in-law capable of adopting a child.²²

It follows from the language of this section read with cl (i) and (ii) of s 11 that a male Hindu has the capacity and the right to have both an adopted son and an adopted daughter, provided there is compliance with the requirements and conditions of such adoptions laid down in the Act, including the consent of the wife.²³

Any adoption made by a male Hindu who does not have the requisite capacity to take in adoption or the right to take in adoption is null and void.

The requirement of consent of the other spouse is not violation of art 14 of the Constitution.²⁴

Old Law

See §§ 449 and 450 (Vol I).

8. Capacity of a female Hindu to take in adoption.—Any female Hindu—

- (a) who is of sound mind;
- (b) who is not minor; and
- (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind,
has capacity to take a son or daughter in adoption.

²² *Bhima Kotba v Sarat Chandra* AIR 1988 Ori 14.

²³ *Krishna Chandra v Pradepta Das* AIR 1982 Ori 111; *Siddaramappa v Gouravra* AIR 2004 Kant 230.

²⁴ *Lalitha Ubhyankar v Union of India* AIR 1991 Kant 188.

CAPACITY OF A FEMALE HINDU TO TAKE IN ADOPTION

The section brings about a very important and far-reaching change in the law of adoption as hitherto applied in case of Hindus. It is competent now to a female Hindu who is of sound mind and has completed the age of 18 years to take a son or a daughter in adoption to herself, in her own right—provided she is not married. So also, can a female Hindu who has completed the age of 18 and is a widow or a divorcee, or if married and her husband has finally renounced the world, or has ceased to be a Hindu or has been declared to be of unsound mind by a court having jurisdiction to pass a declaratory decree to that effect.

It follows from cl (c) of this section that a Hindu wife cannot adopt a son or daughter to herself even with the consent of her husband because this section expressly provides for cases in which she can adopt a son or daughter to herself, and during the lifetime of the husband, she can only make an adoption in the cases mentioned in cl (c).²⁵

It will be noticed that s 6(1) requires that the person who wants to adopt a son or a daughter must have the capacity and also the right, to take in adoption. The present section speaks of what is described as 'capacity'. Section 11, which lays down the conditions for a valid adoption, requires that in case of adoption of a son, the mother, by whom the adoption is made, must not have a Hindu son, son's son or great-grandson (by legitimate blood relationship or by adoption) living at the time of adoption.

It follows from the language of the section read with cl (i) and (ii) of s 11 that a female Hindu has the capacity and the right to have both an adopted son and adopted daughter, provided there is compliance with the requirements and conditions of such adoptions laid down in the Act.

Any adoption made by a female Hindu who does not have the requisite capacity to take in adoption or the right to take in adoption, is null and void.

The section is not violative of art 14 of the Constitution.²⁶

ADOPTION BY WIDOW

Under the law as previously applied, no female including a wife or a widow could adopt a son to herself. After the death of the husband, a widow could adopt a son in certain parts of India if he had expressly authorised her to adopt, and in other parts of India, even without such authority. The adoption, however, whether by a wife with consent of the husband or by a widow after his death was not of a son to herself, but to her husband. The status in law of a female Hindu has now considerably changed. The Hindu women's

²⁵ *Dasbrath v Pandu* (1976) 78 Bom LR 426.

²⁶ *Lalitha Ubhyankar v Union of India* AIR 1991 Kant 186

limited estate is now abolished by the Hindu Succession Act and a widow holds property acquired by her, whether before or after the commencement of that Act including property inherited from the husband, as her absolute property, and the scheme of that Act is to treat male and female heirs equally in matters of succession. A logical corollary of that was to permit both male and female Hindus to adopt a son or a daughter and to do so in his or her own right. The present section recognises the right of a widow to adopt a son or a daughter to herself. There must, of course, be compliance with the requirements and conditions of such adoptions laid down in the Act. The effect of adoption by a widow, of a son or daughter, will be to clothe the adopted son or daughter with all the rights of a natural born son or daughter in the adoptive family, and to create all the ties of the child in the family (s 12). The result of this is that for all purposes (subject to the rules laid down in the provisos to s 12), the adoptee in effect becomes the son or daughter not only of the widow, but of her deceased husband as well. The adoptee acquires the same status as that of a natural-born child with all the consequences and incidents of that status. Thus, for instance, the child will be in the same position as a natural-born child of the adoptive mother and her deceased husband in matter of succession to all their relatives. Such adoption by the widow will not have the effect of curtailing her right to dispose of her separate property by transfer or even by way of testamentary disposition.²⁷

As aforesaid, the capacity of a female Hindu to take in adoption is regulated by the above provisions. The effect of such adoption by the widow would be that for all intents and purposes as stated above, the adopted child becomes the child of the widow as well as that of the deceased husband and would acquire the status and incidents of being a natural child to the adoptive mother, as well as to the deceased father. However, when such widow adopts a child, such adoption is circumscribed to adopting a child to herself, and not to her husband. If the widow adopts a child to her deceased husband, the law would be as previously applied. This section would not have any application in case of adoption to the deceased husband and it is the *shastrik* law that will be applicable. Under that law, the widow would have to have a specific authority by the husband to adopt to him. In the absence of such authority, the adoption by the widow to her husband would not be validated.²⁸

Old Law

See §§ 451–473 (Vol I).

²⁷ *Ugre Gowda v Nagegowda* AIR 2004 SC 3974.

²⁸ *Rajendra Kumar v Kalyan* AIR 2000 SC 3335.

9. Persons capable of giving in adoption.—(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of [sub-section (3) and sub-section (4)²⁹] the father, if alive, shall alone have right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child³⁰ or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known³¹, the guardian of the child may give the child in adoption with the previous permission of the court to any person including the guardian himself.

(5) Before granting permission to a guardian under sub-section (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

Explanation—For the purposes of this section—

- (i) the expression ‘father’ and ‘mother’ do not include an adoptive father and an adoptive mother;
- (ia) ‘guardian’ means a person having the care of the person or a child or of both his person and property and includes—
 - (a) a guardian appointed by the will of the child’s father or mother, and
 - (b) a guardian appointed or declared by a court³², and

²⁹ Substituted by Act 45 of 1962, s 3 for sub-s (3).

³⁰ *Ibid.* *SK Das v Superintendent JNM Hospital* AIR 1996 Cal 264 (abandoned child to be deemed in guardianship of Juvenile Justice Board).

³¹ *Ibid.*

³² *Ibid.*

- (ii) 'court' means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.

WHO MAY GIVE A SON OR DAUGHTER IN ADOPTION

The section deals with the subject of persons who may lawfully give a son or daughter in adoption. The section does not make any substantial changes in the law on this branch of the subject previously applicable to Hindus, except that under that law the only persons who could lawfully give a son in adoption were his father and mother. The present section principally confines the capacity to give a son or a daughter in adoption to the father and the mother of the child, but it also rules that where both the father and mother are dead or disabled from exercising the right by reason of mental incapacity, or renunciation of the world, the guardian of the child can give the child in adoption with the previous permission of the court. The rules laid down in the section are simple and not likely to give any difficulty in interpretation.

FATHER

The primary right to give a son or daughter in adoption is that of the father alone. The right of the father to give in adoption is, however, not absolute, but is circumscribed by the condition enacted in sub-s (2) that in case the mother is living and capable of giving consent, he cannot exercise the right, except with her consent. The consent need not necessarily be expressed. It can be inferred from the facts and circumstances of the case. Usually, where adoption ceremonies are performed the wife also has to take part in the same, and no difficulty of proving consent should arise in practice. The expression 'mother' in the present context must mean the natural mother of the child and not a stepmother, and consent of a stepmother is not necessary. Under the previous law, it has been held that an only son could be given and taken in adoption. There is nothing in the present Act, which bars the giving in adoption of an only son, or an only daughter by the father, provided the mother gives her consent to the same. The *Explanation* to the section makes it abundantly clear that an adoptive father has no right to give the adopted son or adopted daughter in adoption. There cannot be a second adoption of the same child.

MOTHER

The mother cannot give the son or daughter in adoption while the father is alive and capable of consenting, without permission of the father. The

mother can, however, exercise the right if the father is dead or is disabled from giving consent. The expression 'mother' and 'father' in the present context must mean natural mother and natural father, and not a stepmother or a stepfather. A stepmother has no right to give a stepson or a stepdaughter in adoption even though the father may be dead or is disabled from giving consent.³³ She may, however, apply to the court if she was appointed the testamentary guardian of the child or on her application, the court may appoint or declare her to be the guardian of the child, and the court may grant her permission to give the child in adoption if it is satisfied that the adoption will be for the welfare of the minor.

The *Explanation* to the section makes it abundantly clear that an adoptive mother has no right to give away in adoption her adopted son or adopted daughter. There cannot be a second adoption of the same child.

SANCTION OF THE COURT

Sub-section (4) lays down the rule that in case of a child, both of whose parents are dead or are disabled from exercising the right to give in adoption or where the parentage of the child is not known, the guardian of the child may give the child in adoption with the previous sanction of the court. The guardian may be a person who has the care of the person of a child or both his person and property, or a testamentary guardian, or one appointed or declared by the court. Sub-section (5) requires the court before granting such permission to satisfy itself that the adoption will be in the interest of the minor. In such a case, as in all matters affecting minors, the paramount consideration for the court should be the welfare of the minor. If the minor is sufficiently grown up to express its wish in the matter and capable of understanding the matter, the court must ascertain and give due consideration to such wishes before deciding what will be the welfare of the minor.

The court would exercise greater vigilance while dealing with cases of inter-country adoptions, and consider all relevant factors before giving its decision.³⁴

An adoption is not invalid merely because the person giving in adoption receives a consideration for the adoption from the person taking in adoption, though the promise to pay cannot be enforced in law as being contrary to public policy. The court would not, as a rule, sanction giving of the child in adoption when the guardian who seeks permission of the court is to receive or has received any payment or reward in consideration of giving the child in adoption. Even so, the welfare of the child being the primary and paramount consideration, sub-s (5) empowers the court to sanction the adoption in any such case, if it is satisfied that the adoption of the child will

³³ *Dhanraj v. Suraj Bai* AIR 1975 SC 1103, confirming *Dhanraj v. Suraj Bai* AIR 1973 Raj 7.

³⁴ *Re Rasiklal Mehta* 22 Guj LR 921.

be for his well-being and happiness. This part of the rule laid down in sub-s (5) must be read with s 17 of the Act which lays down not only an absolute prohibition against any person receiving or agreeing to receive any payment or other reward in consideration of the adoption of any person, but also renders the contravention of the rule a penal offence. It is difficult to imagine that the court would sanction any payment or reward when the receipt of the same and even the mere agreement to receive the same is prohibited and rendered illegal by making it an offence. The language of the latter part of the section may not remain a dead letter if the payment is to be received or has been received by the applicant in his capacity as the guardian, that is for the benefit of the adoptee and not for the benefit of the guardian. In such a case, the court may well sanction the payment or reward and also the giving of the child for his welfare in adoption by the guardian.

The application under sub-s (4) must be made to the city civil court or the district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides (*Explanation* (ii)).

Since the family courts have not been conferred jurisdiction for matters covered under this section, it is only the civil court or the district court, which can grant sanction for adoption.³⁵

Old Law

See §§ 474–79A (Vol I).

10. Persons who may be adopted.—No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

- (i) he or she is a Hindu;
- (ii) he or she has not already been adopted;
- (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
- (iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

PERSONS WHO MAY BE ADOPTED

The section deals with the subject of persons who may be lawfully taken in adoption. It can be seen from §§ 480–87 (Vol I) that the law on this

³⁵ *Re Canara Bank and Relief Welfare Society* AIR 1991 Kant 6.

branch of the subject was not uniform, and there was divergence of judicial opinion on certain aspects of the matter. The present section lays down some simple rules of uniform application to all Hindus, the expression 'Hindus' being understood in the wide connotation given to it by s 2.

The section brings about some important changes in the law on this branch of the subject. Under the law as hitherto applied, the person to be adopted had to be a male since adoption of a daughter was not recognised. Now under the Act, adoption can be both, of a son as well as of a daughter. Another condition, imposed in the matter of the person who could be taken in adoption by the law as was hitherto applied, was that the person to be adopted must not be a boy whose mother the adopting father could not have legally married; but this rule was not strictly followed and in course of time was restricted only to the case of a daughter's son, sister's son and mother's sister's son. The restriction was not applied to *sudras* and even as to the three other castes, it was held that an adoption, though prohibited under the rule, could be valid if sanctioned by custom. The present section does not lay down any such limitation or restriction and any person may now be validly adopted, provided the person is capable of being taken in adoption as laid down in the section and the other conditions relating to adoption are fulfilled. Disease, defect or deformity is now no disqualification in matter of succession. It will be noticed that the sections do not lay down any bar to adoption on any such ground. Therefore, a person who is deaf and dumb or suffering from any other defect, disease, or deformity may validly be given and taken in adoption.

It is a very well-settled principle that what is not the intention of the legislature cannot be imported into the provisions of law. The provision cannot be stretched beyond the legislative intent. The provisions of this section lay down some rules as regards the person to be taken into adoption. These rules, as can be seen, can be said to be negative covenants, restricting the category of persons who may be taken into adoption. These provisions have to be read in conjunction with the provisions of s 6 of the Act, as not only the person taking into adoption, but also the person to be adopted must satisfy the requirements of both sections respectively. Only then would such adoptions be valid. Taking careful note of the provision aforesaid, it has been held that a lunatic can be adopted, as there are no such restrictions enumerated in the section.³⁶

CLAUSE (I)

Under the previous law, it was necessary that the person to be adopted had not only to be a Hindu, but had to belong to the same caste as his adoptive

³⁶ *Dergonda Patil v Shringonda Patil* AIR 1992 Bom 189, *Siddaramappa v Gouramma* AIR 2004 Kant 230.

father; thus a Brahmin could not adopt a *Kshatriya*, a *Vaishya* or a *Sudra*. No such restrictions are imposed by the Act, and the limitations pertaining to the caste of the child to be adopted, are abolished. All that is now required is that the boy or girl to be adopted must be a 'Hindu', which expression is to be understood in the very wide connotation given to it by s 2. It is, therefore, permissible now to a 'Hindu' and belonging to any caste, or a Jain, or a Buddhist or a Sikh to take in adoption a boy or a girl who is 'Hindu' in that expansive sense and regardless of the caste of the boy or girl. Thus, for instance, a *Sudra* can validly adopt a boy or girl of any caste so long as the boy or girl is a Hindu by religion, or a Jain, or a Buddhist or a Sikh. A stranger may be adopted although there are near relatives. All that is required by cl (i) of the present section is that the person adopted must be a 'Hindu' in the wide general sense in which the expression is to be understood. The other conditions relating to the matter laid down in the other clauses must, of course, be fulfilled.

CLAUSE (II)

This clause lays down that the boy or the girl to be adopted must not already have been previously adopted. This clause reiterates the rule of Hindu law that a person can be given in adoption only once, and that there cannot be a second adoption of the same person.

CLAUSES (III) AND (IV)

There was difference of opinion between the various schools of Hindu law as to the age of the son to be adopted, and as to whether a married person could or could not be adopted. Clauses (iii) and (iv) of the present section now deal with this aspect of the matter. The son or daughter to be adopted must not be a person who has already been married, and must not have completed the age of 15 years. The respective conditions are subject to the important qualifications that they are not to apply if there is a custom or usage applicable to the parties which permits of a married boy or girl being adopted, or a boy or girl who has completed the age of 15 years being adopted.

These clauses (iii) and (iv) must be read with s 4 of the Act which gives overriding effect to the provisions of the Act as therein mentioned and s 3(a), which gives the connotation of the expressions 'custom' and 'usage'. The 'custom' and 'usage' envisaged in cll (iii) and (iv) must mean some special rule which in a particular family or a particular class or community, or in a particular district or area, governs the parties, although it is different from the general rule of Hindu law which would otherwise have been applicable to the parties. Thus, for instance, if a boy more than 15 years of

age is adopted, the adoption can be sustained only on proof of any such special custom indicated above affecting parties in Western India (Bombay School). The decisions of the High Courts of Bombay and Madhya Pradesh on this question, showed divergence of judicial opinion.³⁷ A Full Bench of the Bombay High Court has held that the intention of Parliament was to preserve custom or usage, where express provision on that behalf was made in the Act.³⁸ When the custom of adoption of a child beyond the age of 15 years is established and judicially recognized, not only would such an adoption be valid, but also, once having been judicially accepted, the custom would not have to be proved in subsequent cases.³⁹

Old Law

See §§ 480–87 (Vol I). The effect of the rule laid down in the present section read with s 12 will be that the adoption called *dyamushyayana* [§ 486 (Vol I)] cannot be resorted to after the commencement of the Act.

11. Other conditions for a valid adoption.—In every adoption, the following conditions must be complied with:

- (i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
- (iv) if the adoption is by a female and the person to be adopted

³⁷ *Laxman v Anusuyabai* AIR 1976 Bom 264 (special custom must be established inductively); *Balkrishna v Sadashiv* AIR 1977 Bom 412, contra *Moolchand v Amrithai* (1976) Mad LJ 382 (rule that there is no restriction of 15 years was based only on custom and is not abrogated); *Haribai v Baba Anna* AIR 1977 Bom 289; *Housabai v Jhabar* AIR 1972 Bom 98; *Ramchandra v Baburao* (1976) Mah LJ 125 (opinion of community). Reference may also be made to observation in *Dhanraj v Suraj Bai* AIR 1975 SC 1103; *Mahalingam v Kannayyan* AIR 1990 Mad 333; *Namichand Patni v Basantibai* AIR 1994 Bom 235 (conditions (iii) and (iv) not satisfied, adoption invalid, custom not proved); *M D Gopalaiah v Usha* AIR 2002 Kant 73 (custom not proved); *Virendra Singh v Kashiram* AIR 2004 Raj 197.

³⁸ *Anirudha Jagdaorao v Bala Rao* AIR 1983 Bom 391 (s 4, examined).

³⁹ *Kondiha Papali v Narayan* AIR 1991 SC 1180.

is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

- (v) the same child may not be adopted simultaneously by two or more persons;
- (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth [or in case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up]⁴⁰ to the family of its adoption:

Provided that the performance of *datta homam* shall not be essential to the validity of an adoption.

INTRODUCTION

This section lays down some vital rules relating to the law of adoption. The rules and conditions stated in the section are absolute and non-compliance with any of them will render an adoption invalid.

CLAUSE (I): ADOPTION OF A SON CAN BE ONLY BY A PERSON WHO HAS NO SON

The object of adoption of a son by a Hindu is twofold. The first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water to the manes of the adopter and his ancestors. The second is secular, to secure an heir and perpetuate the adopter's name. Hindu law, at one time, recognised 12 kinds of sons of which there were five kinds of adopted sons. Modern law recognised the *aurasa* or legitimate son begotten by a man himself by the lawfully wedded wife and of the adopted sons; it recognised only two kinds—the *dattaka* and the *kritrima*. The *dattaka* form prevailed all over India; the *kritrima* form prevailed in Mithila and adjoining districts. The very basis of adoption being substitution of a secondary son in place of an *aurasa* or a real son for the objects mentioned above, the rule was fundamental that only a person who had no son, grandson or great-grandson could validly take a son in adoption. Clause (i) of the section reiterates that rule, which in view of the right to adopt being now conferred on a female Hindu must evidently apply to both the adoptive father and the adoptive mother, and lays down that the adoptive father or mother by whom the adoption is made must not have Hindu son, grandson or great-grandson (whether by legitimate blood relationship or by adoption) living at the time of adoption.

⁴⁰ Inserted by Act 45 of 1962, s 4.

A person who has an adopted son living cannot adopt another son. So also, a person who has a grandson or a great-grandson by adoption living, cannot adopt a son. Existence of an illegitimate son is not a bar to male or female Hindu taking a son by adoption. However, the existence of a son who is to be deemed to be a legitimate child of the parents by operation of s 16 of the Hindu Marriage Act 1955, would be a bar to the father's or mother's right to take a son in adoption.

The clause speaks of the existence of a Hindu son as a bar to adoption.⁴¹ If a son has renounced Hinduism and been formally converted to any other religion and there is no other son, or a grandson or a great-grandson, the father or the mother has the right to take a son in adoption. The same considerations would apply in case an adopted son becomes a convert to any other religion.

The existence of a daughter or a son's daughter or an adopted daughter or grand-daughter is no bar to the right of a Hindu male or female taking a son in adoption. Nor is the existence of a stepson any bar to the right of a Hindu female taking a son in adoption.⁴² After the coming into operation of the Act, a Hindu male or female may have both an adopted son and an adopted daughter if the conditions laid down in the section are fulfilled.

Old Law

See § 450 (Vol I).

CLAUSE (II): ADOPTION OF A DAUGHTER CAN BE ONLY BY A PERSON WHO HAS NO DAUGHTER

The object of recognising the right to take a daughter in adoption now conferred by the Act is to permit a person, male or female, to have a substituted or secondary daughter in the absence of a natural born daughter and it, therefore, stands to reason that the right should not be allowed to be exercised when there is a daughter or a son's daughter in existence. A person who has an adopted daughter or the adopted daughter of a son living, cannot adopt a daughter. Existence of an illegitimate daughter is not, however, a bar to a male or even a female Hindu taking a daughter in adoption, although the illegitimate daughter is entitled under the Hindu Succession Act to succeed to the property of the mother. However, the existence of a daughter who is to be deemed to be a legitimate daughter of the parents by operation of s 16 of the Hindu Marriage Act 1955, would be a bar to the father's or mother's right to take a daughter in adoption.

The clause speaks of the existence of a Hindu daughter as a bar to

⁴¹ *Krushna Kabail v Narana* AIR 1991 Ori 134 (implications of custom discussed adoption during lifetime of son invalid, custom cannot override provisions of law)

⁴² *Radhakrishana v Shayam Sundar* AIR 1964 Ori 136

adoption. If a daughter has renounced Hinduism and been formally converted to any other religion, and there is no other daughter or no son's daughter, the father or mother has the right to take a daughter in adoption. The same considerations would apply in case an adopted daughter becomes a convert to any other religion.

The existence of a son or a grandson or a great-grandson (by legitimate blood relationship or by adoption) is no bar to the right of a Hindu male or female taking a daughter in adoption. After the coming into operation of the Act, a Hindu male or female may have both, an adopted son and an adopted daughter, if the conditions laid down in the section are fulfilled.

CLAUSE (III): AGE OF ADOPTIVE FATHER

This clause requires that in case of adoption of a daughter by a male Hindu, the daughter must be at least 21 years younger than the adoptive father. This is obviously a precautionary measure. There was no similar rule under the previous law.

CLAUSE (IV): AGE OF ADOPTIVE MOTHER

This clause requires that in case of adoption of a son by a female Hindu, the son must be at least 21 years younger than the adoptive mother. This, is obviously, a precautionary measure, there was no such restriction of age under the previous law. This condition must be complied with, otherwise the adoption would be invalid.⁴³

CLAUSE (V): SIMULTANEOUS ADOPTION

This clause reiterates the rule that the simultaneous adoption of the same child by two or more persons is invalid as to the child, as well as all the adoptive parties. The Act proceeds on the principle that there can be adoption of one person by the adoptive person alone, either a male or a female Hindu. Simultaneous adoption of two daughters also would be invalid under the Act.⁴⁴

CLAUSE (VI): ACT OF ADOPTION AND CEREMONIES INCIDENTAL TO IT

Under the previous law, the ceremonies relating to adoption which included the physical act of giving and receiving with intent to transfer the boy from one family to another were essential to the validity of an adoption. As to

⁴³ *Golakchandra v Krutibas* AIR 1979 Ori 205.

⁴⁴ Reference may be made to § 485 (Vol I).

datta homam, that is oblations of clarified butter to fire, it was not settled whether its performance was essential to the validity of an adoption in all cases, and there was conflict of opinion on the subject (§§ 488–90 (Vol I)). The present clause states in unmistakable terms that the performance of *datta homam* is not essential to the validity of an adoption. No particular ceremonies are necessary for a valid adoption in case of a Sikkimese Buddhist.⁴⁵

‘MUST BE ACTUALLY GIVEN AND TAKEN’

This clause states in express terms that there must be the actual giving and taking of the child with intent to transfer the child from the family of its birth to the family of its adoption. The physical act of giving and receiving was absolutely necessary for the validity of an adoption under the law as it existed before coming into force of the present Act, and the position under the Act is identical.⁴⁶ The section, however, does not prescribe any particular mode or manner for the act of giving and taking. What is essential is that there should be some overt act to signify delivery of the child from one family to another. It would be sufficient, for instance, if the natural parent is asked to give his or her child in adoption, and the child is handed over by him or her to the adoptive parent. The child need not necessarily have sat on the lap of the adoptive parent.⁴⁷ It is the substance and reality of the acts that matters. However, mere expression of consent, or the execution of a deed of adoption, though registered, but not accompanied by actual giving and receiving, will not operate as a valid adoption. Thus, in the absence of documentary or other proof of an adoption, and the ceremonies also not shown to have been performed, the fact of such an adoption cannot be believed.⁴⁸

CHILD

The expression ‘child’ in this clause would include a minor as well as a major.⁴⁹

⁴⁵ *Sonam Jopayyal v Gompu* AIR 1980 Sikkim 33.

⁴⁶ *Dhanraj v Suraj Bai* AIR 1975 SC 1103; *Jai Singh v Shakuntala* (2002) 3 SCC 634 (actual giving and taking essential); *Urmila Devi v Hemant* AIR 1993 Ori 213 (giving and taking ceremony not established); *Namichand Patni v Basantbai* AIR 1994 Bom 235; *Sebati Baral v Dungal Baral* AIR 2000 Ori 158.

⁴⁷ *Moolchand v Amrithai* (1976) MLJ 382; *Kartar Singh v Surjan Singh* AIR 1974 SC 2162 (adoption was with the ceremony of giving and taking. The mere fact that the ‘adoption deed’ stated ‘according to custom’ did not affect the validity of the adoption).

⁴⁸ *Nilima Mukherjee v Kanta Bhushan Ghosh* AIR 2001 SC 2725.

⁴⁹ *Dhanraj v Suraj Bai* AIR 1975 SC 1103.

POWER VESTS ONLY IN THE FATHER OR THE MOTHER

The power to give a son or daughter in adoption vests in the father or the mother. A guardian, as already pointed out, may now under the Act give a child in adoption with the previous sanction of the court.⁵⁰ The power (or right) to give a child in adoption cannot be delegated to any person; but the father or the mother or the guardian, as the case may be, may authorise another person to perform the physical act of giving a son or a daughter in adoption. Likewise, the adoptive father or the adoptive mother can authorise any person to accept the child in adoption on his or her behalf.⁵¹

Reference may be made to §§ 489 and 490 (Vol I) and the cases cited therein.

FREE CONSENT

Every valid adoption implies the free consent to the adoption of the person giving and the person receiving in adoption, and also, it would seem, of the person adopted, if he is a major at the date of adoption (where the custom or usage applicable to the parties permits of adoption of a child who is not a minor). Reference may be made to § 491 (Vol I). As regards proof of adoption, see § 512 (Vol I).

12. Effects of adoption.—An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that—

- (a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;
- (b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;
- (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

⁵⁰ Section 9(4).

⁵¹ See § 489 (2), Vol I.

RESULT AND EFFECTS OF ADOPTION

This section lays down some vital rules relating to the result of adoption. The primary and the principal result of adoption is that of transferring the adopted boy or girl from his or her natural family into the adoptive family. It confers upon the adoptee the same rights and privileges in the family of the adopter as the legitimate natural born son or daughter for all purposes with effect from the date of adoption. The adoptee is to be deemed to be the child of his or her adoptive father or mother for all purposes, and from the date of adoption all the ties of the child in the family of his or her birth are to be deemed to have been severed and replaced by those created by the adoption in the adoptive family. Where a statute enacts that something shall be deemed to exist or to have happened or some status shall be deemed to have been lost or acquired on the happening of something, which would not otherwise have been so, effect must be given to the statutory fiction and it must also be carried to its logical conclusion. In such a case, full effect must be given to the putative state of affairs and the status deemed to have been acquired or lost as also to all the inevitable corollaries of the state of affairs and altered status, unless there is something in the statute which prohibits the legal fiction being applied with all its inevitable corollaries and with the consequences and the incidents of the state of affairs and status deemed to have come into existence.⁵² Subject to this qualification, that which is deemed to have taken place, is to operate for all purposes. The section is founded on this principle and states that the adoptee is to be deemed to have severed all ties in the family of his or her birth, and similar ties are to be deemed to have been replaced in the adoptive family. There are, however, three qualifications to the logical effect and corollaries to the general rule and they are stated in the provisos to the section. However, they are subject to the same principal rule which applies with all its consequences and incidents. Thus, subject to the rules laid down in provisos (b) and (c), full effect is to be given to the principal rule in all matters of succession *ex parte paterna* and *ex parte materna* as also, where the adoptive father or adoptive mother is or was at the time of adoption, a member of a joint Hindu family. The section does not recognise any exception in favour of the form of adoption called *diyamus̥hyayana* (§ 486 (Vol I)), and there cannot be any valid adoption in that form after the coming into force of this Act.

Reference may be made to 'Relative by adoption' in notes under s 8 of the Hindu Succession Act 1956 *ante*. Reference may also be made to notes under 'Adopted son' *ante*; 'Adopted daughter' *ante*; 'Mother' *ante*; 'Father' *ante* and other heads under the relevant sections of the Hindu Succession Act (ss 14–15).

⁵² *East End Dwelling Co Ltd v Finsbury Burrow Council* (1952) AC 109; *State of Bombay v Pandurang* [1953] SCR 773, 778–79.

‘...FOR ALL PURPOSES WITH EFFECT FROM THE DATE OF ADOPTION’

It will be noticed that the adoptee is to be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption, and not to be deemed to have been in womb of the adoptive mother at the time of the death of her deceased husband, in case of adoption by a widow under the old law. In case of any such adoption, the adopted child cannot divest any person of any estate, which vested in him or her before the adoption. Reference may be made to the notes under ‘Proviso (c)’ *post*.

Under the old law, the rule that an adopted son was entitled to succeed as if he were a natural-born son, was subject to certain exceptions mentioned in § 497 (see Vol I). The effect of the rule laid down in the present section is to abrogate those exceptions, and the adopted son or adopted daughter is for all purposes of succession and partition, to be deemed to be the natural born child of the adoptive parents. In matters of succession, the adopted son or daughter is now entitled to the same share as an after-born natural son or natural daughter of the adoptive parents.

‘FOR ALL PURPOSES’

These words must be understood to mean ‘for all practical purposes’ and accordingly, the adoptee would acquire the caste of the adoptive parents without anything more to be done by him or others.⁵³

ADOPTION BY WIDOW

There was difference of opinion on the question whether after coming into force of this Act, in case of adoption by a widow, the adopted son becomes the son also of the deceased adoptive father. The High Courts of Bombay⁵⁴ and Allahabad⁵⁵ took the view that the adopted son should be regarded as the son of the widow as well as her deceased husband. A contrary view was taken in a decision of the High Court of Madras.⁵⁶ In *Sitabai v Ramchandra*⁵⁷ decided by the Supreme Court, a joint family originally consisted of two brothers *D* and *B* and the wife, *B*. Many years after the death of *B*, his widow

⁵³ *Khazam Singh v Union of India* AIR 1980 Del 60 (scheduled caste), contra *AS Sailaja v Principal KM College* AIR 1986 AP 209 (reservation-caste, backward class).

⁵⁴ *Ankush v Janabai* AIR 1966 Bom 174.

⁵⁵ *Suhbas Misir v Thagi Misir* AIR 1967 All 148.

⁵⁶ *Arumugha v Vallimmal* AIR 1969 Mad 72.

⁵⁷ AIR 1970 SC 343; *Sawan Ram v Kalawanti* AIR 1976 SC 1761; *Shailappa v Mutlaramma* AIR 1982 Kant 334.

adopted a son *S* in 1958. Sometime thereafter, *D* died. The question was raised whether the adoptee could be regarded as the son of the widow as well as her husband *B*, and whether he became a coparcener with *D* in the joint family. It was held by the Supreme Court (agreeing with the view taken by the Bombay High Court) that on his adoption, *S* became a coparcener with *D*, and after the death of *D* became entitled to possession of all the joint family property as a sole surviving coparcener. *S* would, for all purposes, be regarded as the son of *B* and the adoptive mother.

PROVISO (A)

Though adoption has the effect of removing the adopted child from the natural family into the adoptive family, it does not sever the tie of blood in the family of birth in the matter of marriage. This proviso lays down the express and explicit exception to the general rule which applies for all purposes and enacts that the adoptee, despite the severance of all the ties in the natural family, cannot marry any person whom he or she could not have married in the family of his or her birth. Clause (iv) of s 5 of the Hindu Marriage Act 1955, lays down as one of the conditions of valid Hindu marriage that 'the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two'. Both these conditions are equally applicable to an adoptee, and the adoptee cannot marry any person whom he or she could not have married on the ground of prohibited relationship or *sapinda* relationship, as if he or she had continued in the family of his or her birth. The *Explanation* to s 3 of the Hindu Marriage Act 1955, inter alia states that relationship for the purpose of *sapinda* relationship and prohibited degrees of relationship includes relationship by adoption as well as by blood. (Reference may be made to the notes under cll (iv) and (v) of s 5 of the Hindu Marriage Act 1955, *ante*. Reference may also be made to notes under cll (f) and (g) of s 3 of the Hindu Marriage Act 1955, *ante*. Reference may particularly be made to the diagrams and illustrations given there. Those illustrations are equally applicable to the case of a bride or a bridegroom who has by adoption gone out of the family of her or his birth).

PROVISO (B)

Adoption did not have the effect under the Bengal school of Hindu law (Dayabhaga Law) of divesting any property which had vested in the adopted son by inheritance, gift, or under any power of self-acquisition prior to his adoption. As regards cases governed by Mitakshara law, there was some divergence of judicial opinion on certain aspects of the matter (§ 494, Vol D). The present section lays down the clear rule that any property that might have vested in the adoptee before the adoption, continues to vest in the

adoptive, subject, of course, to any obligations attaching to the ownership of such property including the obligation of the adoptee to maintain relatives in the family of his or her birth. The adopted person is not, by the fact of adoption, divested of any property already vested in him. It follows as a corollary to that rule that the fact of adoption should not operate to the prejudice of persons related to the adoptee in the natural family who had the right to claim maintenance from such adoptee.

This proviso, as aforesaid lays down that property vesting in an adoptee before the adoption continues to vest in him post his adoption, subject to certain terms and obligations. There is a controversy as regards the adoptee being divested of the coparcenary property in the family of his birth. The High Court of Andhra Pradesh⁵⁸ has held that an adoptee retains his interest in the undivided property of the family of his birth, whereas the High Court of Patna⁵⁹ has held that such a right comes to an end. The High Court of Bombay has, in *Devgonda Patil v Shamgonda Patil infra*, dissenting from the decision of the High Court of Andhra Pradesh, held that an adoptee cannot have a vested interest in the undivided family of his birth. The court observed that the words 'vested property' related to property where indefeasible rights were created and thus, held that it would relate to property where full ownership was conferred. Since there was no question of full ownership in case of coparcenary property, such property of the family of his birth could not be said to vest in a coparcener after his adoption. The reasoning does not appear to be appropriate. The property which vested in the adoptive child at birth, as a member of the coparcenary would continue to vest in him, by the operation of law contained in the proviso, subject to the obligations and liabilities as indicated. Though no coparcener can be said to hold a particular share in coparcenary property, such property is held by all the coparceners as a result of the concept of unity of ownership. The wording of the proviso is indicative of the above reasoning.

It is submitted that since the language of proviso (c) speaks of a different eventuality, reliance placed on the decisions dealing with cases under that proviso is not apposite.

Illustrations

- (a) A has two sons B and C. A gives C in adoption to X, C, is not entitled to inherit from A as his son. On the death of A, the mother of B and C, which had taken place prior to the adoption, C had become entitled to a share (along with A and B) in the property left by her. That share which had already vested in C, will continue to vest in him.
- (b) A and B, are two brothers. A's sons, C and D and B's son E, are all

58 *Y Nayudamma v Govt of Andhra Pradesh* AIR 1981 AP 19.

59 *Santosh Kumar v Chandra Kishore* AIR 2001 Pat 125.

members of a Mitakshara coparcenary. *A* gives his son *C* in adoption to *X*. *C* loses all his rights as a coparcener in his natural family. The coparcenary, which consisted of five members before the adoption, will be reduced after *C*'s adoption to a coparcenary of four members only.

- (c) *A* and his sons *B* and *C* were members of Mitakshara coparcenary. *A* died after the commencement of the Hindu Succession Act 1956, leaving behind his two sons *B* and *C*, his daughter *D*, and his widow *A1*, the natural mother of *B*, *C* and *D*. Soon thereafter *A1* gave *C* in adoption to *X*. By operation of s 6 of the Hindu Succession Act, *A*'s interest in the coparcenary property devolved by succession in equal shares among *A1*, *B*, *C* and *D*. The effect of the adoption will not be to divest *C* of his aliquot share in the father's interest in the joint family property which became vested in him on *A*'s death. *C* will not, however, be entitled to claim a share along with *B* and *D* in the property that may be left by *A1* upon the death.

PROVISO (C): NO DIVESTING OF ESTATE VESTED IN ANY PERSON BEFORE THE ADOPTION

The questions of 'vesting and divesting of estate' on adoption by a widow and particularly by a widow in a joint family governed by Mitakshara law; 'alienations made prior to adoption' and 'surrender prior to adoption' under the old law have been dealt with in §§ 501–09A (see Vol I). The law on some aspects of the question of divesting, it has created many difficulties and anomalous situations. The proviso (c) to the present section (which must be read with the relevant provisions of the Hindu Succession Act 1956), lays down the express and explicit rule that the adoption of a son or a daughter by a male or female Hindu is not to result in the divesting, or any estate vested in any person prior to the adoption. Thus, for instance, where a Hindu widow who inherited her husband's property as an absolute owner, on the death of the husband after the Hindu Succession Act came into operation, adopts thereafter, a son, the son cannot challenge an alienation by the widow though made after such adoption. When a Hindu widow is possessed of properties of her husband and father-in-law, before the coming into force of the Hindu Succession Act, she is only a limited owner. Once the Act comes into force she becomes full owner of the same, and the adoptee cannot divest her of such property. The sale of such property by the widow is valid.⁶⁰ The reason is that the property had already vested in the widow and the adoption does not relate back.⁶¹ The adoptive son

⁶⁰ *MD Gopalaiah v Usha* AIR 2002 Kant 73.

⁶¹ *Joti v Mankubat* AIR 1988 Bom 348; *Banabai v Wasudeo* AIR 1979 Bom 181 reference may also be made to s 13 infra; *K Venkata Somiah v Ramasubamma* AIR 1984 AP 313.

cannot claim to be a joint owner along with his adoptive father.⁶² Nor can the adoption of a son by the widow of a coparcener, while the family is joint, result in the adoptee divesting the surviving coparceners of property vested in them.⁶³ Such adoptive child cannot divest the mother of the property already vested in her, since as mentioned, the adoption does not relate back. On the death of a sole surviving coparcener, the property vests in his heirs and a son adopted by the widow of another deceased coparcener will not divest the properties vested in the heirs. The adoptee cannot claim a share in such property.⁶⁴ The rule laid down in the proviso does not, however, abrogate the incidents of joint family property as will be seen from the Illustrations below. Nor does it have the effect of preventing the adopted son from challenging an alienation made by the adoptive mother prior to 1956 where the alienation was not for legal necessity.⁶⁵ The proviso being clear as regards divesting of property, any alienation by the widow prior to the adoption cannot result in divesting the alienee of his possession.⁶⁶

A gift of coparcenary property by a member is void and there is nothing in s 13 which detracts from the rule. That section applies only where the property after adoption remains capable of being disposed off by the adoptive parent as his or her property. An adopted son can challenge a gift of coparcenary property by the adoptive father (see Illustration (b) below).⁶⁷

Illustrations

- (a) A widow of a deceased coparcener in the joint family adopts a son *B*, the adopted son can claim his share in the joint family property. In such a case, it cannot be said that there was any 'divesting' of any person (any other coparcener) of any estate vested in him, no question of divesting of any person arises for such a case, though introduction of *B* as a coparcener in the joint family may have the effect of decreasing the shares of the coparceners of the family.⁶⁸

62 *Dinaji v Daddi* AIR 1990 SC 1153 (s 12(c) read with s 13); Also see *HP Veeresh v Channabasamma* AIR 1992 Kant 95.

63 *Heera Lal v Board of Revenue* AIR 2001 Raj 318.

64 *Namdev Ghadge v Chandrakant Ghadge* AIR 2003 SC 1735.

65 *Moti Lal v Sardar Mal* AIR 1976 Raj 40; reference may also be made to *Shrishailappa v Muthamma* AIR 1982 Kant 334, 336 where the above proposition was cited with approval.

66 *Kisan Memane v Suresh Memane* AIR 1996 Bom 50.

67 *Mukund Singh v Wazir Singh* (1972) 4 SCC 178, also see notes under s 13 infra, *Housabai v Jijabai* AIR 1972 Bom 98; *Kiran Bala v Ashok Kumar* AIR 1974 Pat 291.

68 *Vasant v Dattu* AIR 1987 SC 398; *DS Agalawe v PM Agalawe* AIR 1988 SC 845, *Devgonda Patil v Shamgonda Patil* AIR 1992 Bom 189.

- (b) In the above illustration, *A* makes a gift of a coparcenary property to *C* after the adoption. It is open to *B*, the adopted son, to challenge the same on the ground that the property belonged to the joint family and *A* had no power to make a gift of the same. Here, the property could not lawfully vest in *C* and no question of divesting can be said to arise (see *Mukund Singh v Wazir Singh* (1972) 4 SCC 178).
- (c) *A* and his brother *B*, and *B*'s son *C* are members of a joint Hindu family. *A* adopts a son *X*. The effect of adoption will be that the coparcenary which consisted of three members will now consist of four members and their rights will be governed by the law relating to joint family and joint family property.
- (d) *A* died leaving him surviving his widow *A1* and property both, self-acquired and ancestral. On *A*'s death, *A1* had inherited the property as a Hindu widow. On the coming into force of the Hindu Succession Act 1956, she held the property as an absolute owner by operation of s 14 of that Act. *A1* adopts a son *B* after the present Act came into force. The effect of the adoption is not to divest any of the property vested in *A1*.
- (e) *A* died after the commencement of the Hindu Succession Act 1956, leaving him surviving his widow *A1* and two daughters *D* and *D1*. On *A*'s death *A1*, *D* and *D1* inherited his property in equal shares according to the provisions of ss 8 and 10 of that Act. After *A*'s death, *A1* adopts a son *B*. The adoption of *B* will have effect from the date of his adoption and *B* will not divest *A1*, *D* or *D1* of the estate which vested in them before his adoption.
- (f) *A* died before the commencement of the Hindu Succession Act 1956, but after the commencement of the Hindu Women's Rights to Property Act 1937, leaving him surviving his widow *A1* and his two brothers *B* and *C*. At the time of his death, *A* was a member of a Mitakshara coparcenary, consisting of himself and his two brothers. The effect of s 2 of the Hindu Women's Rights to Property Act 1937, was that *A1* took the same interest in the coparcenary property as *A* himself had but her interest was a limited interest (Hindu Women's estate). There was no partition and the family continued as before. The effect of s 14 of the Hindu Succession Act 1956, was that the limited interest of *A* in the joint family property came to be held by her as a full owner, and not as a limited owner. After the commencement of the present Act, *A1* adopts a son, *S*. The adoption of *S* will have effect only from the date of his adoption and *S* will not divest *A1*, *B* or *C* of any rights or interest in any property. Nor will the adoption have the effect of introducing *S* in the coparcenary as one of its members. *S* will, however, after the date of his adoption, be entitled to a right of succession to the

property of A1 as her son in case of intestacy, and also to the property of the relatives of A and A1, in case succession opens and he is one of the heirs of the deceased relatives under the provisions of the Hindu Succession Act 1956.

- (g) A died after the commencement of this Act, leaving him surviving his widow A1, his separated brother B, and B1 and B2, two minor sons of B. A left considerable property, and by his will directed A1 to take B1 in adoption. He expressly stated in his will that A1 was not to be the absolute owner of the property left by him, but to take a restricted estate in the same and was only to enjoy the income of the same and to hand it over to the adopted son on his attaining majority. A1 duly took B1 in adoption. Since only a restricted estate has been prescribed for A1 in the will of her husband, she does not take the property as full owner and B1 on attaining majority will be entitled to take the property. Here, the adoption cannot be said to result in divesting A1 of any property vested in her. On adoption, the ties of B1 in the family of B shall be deemed to be severed and replaced by those created in the adoptive family. On death of B, his property will devolve by succession upon B2 and any other heir of his mentioned in Class I of the Schedule to the Hindu Succession Act 1956.

13. Right of adoptive parents to dispose off their properties.—Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

RIGHT OF ADOPTIVE PARENTS TO DISPOSE OFF THEIR PROPERTIES

Under the law as previously applied, a Hindu adopting a son did not thereby deprive himself of his right to dispose of his separate property by gift or will.⁶⁹ There was no implied contract on the part of the adoptive father, in consideration of the gift of his son by the natural father or mother, that he would not dispose of his property by gift or will (§ 498 (1)). When, however, an adoption was made by a member of a joint family governed by Mitakshara law, the adopted son became a member of the coparcenary from the moment of his adoption, and the adoptive father had no power either by deed, or will to interfere with the rights of survivorship of the

⁶⁹ As for customary law to the contrary in Punjab Agricultural Tribes, reference may be made to *Tarachand v Ram Autar* AIR 1975 P&H 20.

adopted son in the coparcenary property. The same principle applied where an adoption was made by a sole surviving coparcener (§ 499 (Vol I)). It can be noticed from s 30 of the Hindu Succession Act 1956, that the interest of a coparcener in a Mitakshara coparcenary property can now be disposed off by him by will, notwithstanding the law relating to joint family and joint family property, although it is not competent to a coparcener, even now to dispose off by gift, his interest in the coparcenary property so as to defeat the right of survivorship.

The property envisaged by the section is ofcourse, property over which the adoptive father or mother had vested in him or her the power of disposal, and not property over which the adoptive parent had no such right. Thus, for instance, a gift of coparcener's property by an adoptive father would be void, and can be challenged by the adopted son.⁷⁰ (See Illust (b) supra, and notes under proviso (c) to s 12 supra).

The present section is in accordance with the law as it previously stood, and as altered by s 30 of the Hindu Succession Act 1956. The rule is simple and lays down that an adoption of a son or a daughter does not deprive the adoptive father or mother of the power to dispose of his or her (disposable) property by transfer *inter vivos* or by will.⁷¹ The rule does not deal with the nature of the rights of disposal of his or her property by an adoptive father or adoptive mother, which must be regulated by other provisions and rules of law. It only lays down that the adoption of a son or daughter is not per se to have the effect of depriving the adoptive father or adoptive mother of the rights to dispose of his or her property.

An agreement to the contrary made by the adoptive father or adoptive mother, i.e, not to dispose of his or her property, in consideration of gift of his son or daughter by the person giving in adoption, is valid and binding on the adoptive father or adoptive mother, as the case may be, though ofcourse, it would not affect the right of a transferee of the property for consideration and without notice of the right created by the agreement.⁷² A unilateral undertaking stating that after the death of the adoptive parents, the adoptive child would alone be the heir, also cannot restrain the adoptive father from making a will,⁷³ in the absence of an undertaking about non-disposal of property by the adoptive father, which is adverted to above.

14. Determination of adoptive mother in certain cases.—(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

70 *Mukund Singh v Wazir Singh* (1972) 4 SCC 178.

71 *Ugre Gowda v Nagegowda* AIR 2004 SC 3974.

72 Reference may be made to Transfer of Property Act 1882, s 40.

73 *Chiranjilal Srilal Goenka v Jasjit Singh* AIR 2001 SC 266.

(2) Where an adoption has been made with the consent of more than one wife, the senior most in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.

DETERMINATION OF ADOPTIVE MOTHER IN CERTAIN CASES

It was well-established under the law of adoption as applied prior to the commencement of this Act, that adoption had the effect of transferring the adopted boy from his natural family into the adoptive family. It conferred upon the adoptee the same rights and privileges in the family of the adopter as the legitimate son, except in a few cases (§ 494(1), Vol I). It was a necessary corollary to that rule that where a person having a wife living, adopted a son, the son also became a son of the adoptive mother. Where a person, having two or more wives, made an adoption in conjunction with one of them specially selected for the purpose, the wife so selected, ranked as the adoptive mother and the other wives as mere step-mothers, the adopted son acquired the right to succeed to the property of the adoptive mother as if he were a natural-born son, subject to certain qualifications which are no longer material. There was, however, some uncertainty about the law on certain aspects of the matter.

SUB-SECTION (1)

Sub-section (1) lays down the express rule that where a Hindu who has a wife living, adopts a son or a daughter (which must be with the consent of the wife), the wife shall be deemed to be the adoptive mother of the son or daughter or both, as the case may be. When a statute enacts that something shall be deemed to exist or some status shall be deemed to have been acquired, which would not otherwise have been so, the court is bound to have regard to the statutory fiction and it has to be resorted to and full effect must be given to it and it should be carried to its logical conclusion. The following statement of the principle by Lord Asquith in a decision of the House of Lords⁷⁴ was quoted with approval by the Supreme Court:⁷⁵

74 *East End Dwelling Co Ltd v Finsbury Burrow Council* [1952] AC 109.

75 *State of Bombay v Pandurang* [1953] SCR 773, 778–79.

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

SUB-SECTION (2)

Sub-section (2) lays down the effect of adoption *ex parte materna quod* the adoptee, where the adoptive father had more than one wife living at the time of adoption and adoption had taken place with the consent of all of them as required by the *Explanation* to s 7 of the Act. In such a case, only the senior most wife is to be deemed to have become the adoptive mother of the adopted child, and the others are to be deemed to be his step-mothers.

SUB-SECTION (3)

Sub-section (3) lays down the effect of adoption *ex parte materna quod*, the adoptee where the adoptive father was at the time of adoption a widower or a bachelor and subsequently gets married. The wife subsequently married by the adoptive father will not be in the position of the adoptive mother of the adoptee, but is to be deemed to be only the step-mother of the adoptee.

Illustration

A a widower adopts a son *B* and subsequently marries *A1*. *A1* dies thereafter leaving behind her husband *A*, and *B* the adoptee. She leaves property acquired by herself. The property left by her will be inherited by *A* alone, and *B* is not entitled to claim a share in it under s 15(1)(a) of the Hindu Succession Act 1956.

SUB-SECTION (4)

Sub-section (4) lays down the effect of adoption where a widow or an unmarried woman adopts a child and subsequently gets married. The man subsequently married by the adoptive mother will not be in the position of the adoptive father, but is to be deemed to be only the step-father of the adoptee.

Illustration

A, an unmarried woman, adopts a daughter *D*. Subsequently, she marries *H* and has a son *S* by him. On the death of *H*, his property will devolve upon *A* and *S* to the exclusion of *D*; but the property that *A* might leave on her death thereafter will devolve upon *D* and *S* in equal shares.

15. Valid adoption not to be cancelled.—No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

VALID ADOPTION CANNOT BE CANCELLED

The section lays down the rule that a valid adoption, once made, cannot be cancelled by the person taking in adoption or any other party to the same. Nor can the adopted boy or girl renounce his or her status as such, and return to the family of his or her birth. The rule that prevailed under the previous law was similar (§ 493, Vol I). There is nothing, however, to prevent an adoptee from renouncing his or her right of inheritance in the adoptive family in which case, the inheritance would go to the next heir.

Neither s 4, nor this section is retrospective in its operation. This section prohibits cancellation of an adoption made after this Act came into operation, and in accordance with the provisions of chapter II. It has been held by the Supreme Court that *Goda-datta* adoption prevailing by custom in certain families and made before this Act came into operation, is unilaterally revocable which right is not affected by this section.⁷⁶

16. Presumption as to registered documents relating to adoption.—Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

⁷⁶ *Daniraiji v Vabuji Maharaj Chandraprabha* AIR 1975 SC 784.

PRESUMPTION ARISING FROM REGISTERED DOCUMENT RELATING TO ADOPTION

The present section lays down a rule of presumption which requires that where there is a duly registered document of the nature envisaged in the section, 'the court shall presume' that the adoption was in compliance with the provisions of the Act, 'unless and until it is disproved'. The *factum* of adoption must be proved in the same way as any other fact, and there are no special rules of evidence to establish an adoption. Evidence in support of an adoption must be sufficient to satisfy the heavy burden that rests upon any person who seeks to displace the natural succession by alleging an adoption [§ 512, (Vol D)]. In practice, it is not unusual to have a registered document duly executed, by the person taking in adoption, and the person giving in adoption. This rule of presumption cannot be invoked if the document is not signed in token of execution of the person giving or the person taking in adoption.⁷⁷

When a lawful adoption takes place, a presumption as per s 16 can be drawn and the presumption would operate as long as it is not challenged, or it is not rebutted by a procedure known to law.⁷⁸

The words 'unless and until it is disproved' appearing at the end of the section makes out that the presumption which would be made under this section is rebuttable.⁷⁹ Ofcourse, the burden of proving that the adoption deed was executed in consequence of fraud or undue influence, rests heavily on the party challenging the same.⁸⁰

Having regard to the facts and circumstances of the case, the court may not raise any conclusive presumption simply from the mere recital in the deed that the husband had given authority to adopt to the adopting widow, the executant of the deed.⁸¹

There is a presumption about the validity of an adoption when the adoption deed is registered, and the adoption is in conformity with the Act.⁸² Though the absence of a registered document does create a doubt

77 *Mahmad v Bainabai* AIR 1975 Kant 79; *Aftabuda n Khan v Chandan Bilasini* AIR 1977 Ori 69 (the court declined to raise the presumption on the ground that there were two documents executed independent of each other; *Ram Jagat v Kanohandevi* AIR 1984 All 44; *Krishnabai v Ananda* AIR 1981 Bom 240; *Arakbha Swain v Kanduri Swain* AIR 1983 Ori 199.

78 *NR Trivedi v DEO Anand* AIR 2004 Guj 53.

79 *Modan Singh v Sham Kaur* AIR 1973 Punj 122; *Jai Singh v Shakuntala* AIR 2002 SC 1428.

80 For instance *Sushil Chandra v Bhoop Kunwar* AIR 1977 All 441; *Dergonda Patil v Shamgonda Patil* AIR 1992 Bom 189 (burden on plaintiff to prove absence of ceremony of adoption).

81 *Vidya Devi v Nand Kumar* AIR 1981 All 274.

82 *Amruta Arora v Union of India* AIR 2004 Guj 51. *Senthilkumar v Dhandapani* AIR 2004 Mad 403 (valid adoption and ceremony). *Ranjit Singh Dhillon v Punjab School Education Board* AIR 2004 P&H 382 (once adoption formalities are complete and deed entered into, ordinarily not to be doubted).

as regards the adoption, if cogent evidence is led to prove adoption, such evidence led by the adoptee may prove the factum of adoption.⁸³

The onus of proof may shift from one party to another as it does in case of proof of any fact under the law of evidence. As to 'mode of proof' and 'estoppel', reference may be made to §§ 512–514 (Vol I), and to the decision of the Supreme Court in *Rahasa Pandiani v Gokulananda*.⁸⁴

The presumption envisaged under the section can be in respect of an adoption 'made in compliance with the provisions of this Act.' It extends both, to the factum of adoption and validity of the same,⁸⁵ but it cannot operate on an adoption made prior to the coming into operation of this Act.⁸⁶

17. Prohibition of certain payments.—(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment, which may extend to six months, or with fine, or both.

(3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorised by the State Government in this behalf.

PROHIBITION OF PAYMENT OF CONSIDERATION OR REWARD FOR ADOPTION

Any agreement to give consideration for giving a son or daughter in adoption is contrary to public policy as amounting to trafficking children. The legislature takes a strict view of the matter and prohibits in this section, the giving and receiving of any payment or reward by any person in consideration of any person. The section renders any such transaction illegal, and renders it a penal offence to do so. Both the person who gives, and the person who

83 *Chandrani Bai v Pradeepkumar* AIR 1991 MP 286; *Lakshmidhar Satapathy v Lingaraj Satapathy* AIR 1999 Ori 12.

84 AIR 1987 SCC 338 (approach of court).

85 *Naresh v Ichrahai* (1979) M LJ 591 (presumption applied in case of adoption by wife of a certified lunatic); *Amar Singh v Tej Ram* AIR 1982 P&H 282 (presumption raised that adoptee had not completed the age of 15); *Ramanna Gowda v Shankarappa* AIR 1988 Kant 248 (document signed by person taking in adoption and natural parents of adoptee—presumption raised that adoption is valid).

86 *Shamsher Singh v Deputy Custodian General* AIR 1973 J&K 89 (FB), *Ranjit Sahu v Nilambar* AIR 1978 Ori 48.

receives any such payment or reward are liable to punishment. Sub-section (3), however, requires that a prosecution for an offence punishable under this section can be instituted only after obtaining the requisite sanction. An agreement by an adoptive son, binding himself from any claim to the property of the adoptive parents would not result into attracting the restrictive provisions of the section, as it cannot be considered to be a consideration for such adoption.⁸⁷

Reference is invited to comments in s 500 (Vol 1) as regards the position prior to coming into force of this Act.

CHAPTER III

MAINTENANCE

18. Maintenance of wife.—(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance—

- (a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or wilfully neglecting her;
- (b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;
- (c) if he is suffering from a virulent form of leprosy;
- (d) if he has any other wife living;
- (e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;
- (f) if he has ceased to be a Hindu by conversion to another religion;
- (g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

⁸⁷ *Jupudi Venkata v Kesava Rao* AIR 2003 SC 3314.

MAINTENANCE OF WIFE

The right of a wife for maintenance is an incident of the status or estate of matrimony, and a Hindu is under a legal obligation to maintain his wife. The obligation to maintain a wife is personal in character, and arises from the very existence of the relation between the parties. Sub-section (1) substantially reiterates that right and lays down the general rule that a Hindu wife, whether married before or after the commencement of this Act, is entitled to be maintained by her husband during her lifetime. The rule laid down in the section cannot, however, be said to be absolute, although the right exists independently of possession of any property by the husband ancestral or self-acquired. The rule laid down in this section is subject to the exceptions stated in sub-s (3) which lay down that she cannot claim separate residence and maintenance, if she is unchaste or ceases to be a Hindu by conversion to another religion. Sub-section (1) must be read with sub-s (2) and sub-s (3). The section must also be read with s 23 which lays down that it shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act.

The right to maintenance under the section is not obliterated on the ground that there was a compromise decree charging the husband's property for maintenance of a deserted wife for life.⁸⁸ Maintenance cannot be refused merely on the ground that the marriage had been dissolved by an agreement to live separately. Such agreement cannot be treated as a decree of divorce, unless there is a dissolution of the marriage by recognised modes. This, however, cannot result in a refusal to grant maintenance.⁸⁹

It would also seem that subsequent resumption of cohabitation might not put an end to a decree for maintenance.⁹⁰

The Gujarat High Court has held that the word 'wife' in this section can also include a divorced wife, by applying the principle that the word 'wife' in s 25 of Hindu Marriage Act implies a divorced wife and since both provisions deal with maintenance, the section would apply to a divorced spouse.⁹¹ This interpretation has been held *per incuriam* by the High Court of Bombay⁹² and in view of the ruling of the Supreme Court in *Chand Dhawan v Jawaharlal Dhawan supra* cited in the commentary to the Hindu Marriage Act, where it has been held that once a decree dissolving the marriage is passed, an order for maintenance would follow under that section. Reference is invited to the commentary under the Hindu Marriage Act. This view appears to be correct.

88 *Rundihala Roy v Putubala* AIR 1985 Cal 47; *Varahamma v Ammathali* AIR 1959 AP 590.

89 *Bouramma v Siddappa Jeevappa* AIR 2003 Kant 342.

90 *Datu Bhau v Tarabai* AIR 1985 Bom 106 and cases cited therein.

91 *Vihalal v Mtnaben* AIR 1995 Guj 88.

92 *Panditro Kalure v Gayabai* AIR 2001 Bom 445.

Maintenance includes provisions for food, clothing, residence, education and medical attendance and treatment (s 3(b)).

There is no inconsistency between the section and s 25(1) of the Hindu Marriage Act.

The forum for application under the section would be the civil court, and not the matrimonial court under the Hindu Marriage Act.⁹³

INTERIM MAINTENANCE

The power to make an interim order for maintenance pending an application under this section is implicit in the section. The mere fact that this section or the Act does not contain any provision of such interim relief, is no ground for negating the same. Such relief would be ancillary, and the power would be a necessary corollary to the power of the court to entertain the application for substantive relief. It has also been regarded as an inherent power of the court.⁹⁴ The High Court of Andhra Pradesh had taken a contrary view,⁹⁵ which has now been overruled.⁹⁶ Reference may also be made to notes under s 24 (Maintenance *pendente lite*) of the Hindu Marriage Act 1955.

If a *prima facie* case is made out, the court would in a case falling under this section, grant interim relief. The jurisdiction of the court does not depend upon the acceptance, or denial of the relationship or the right by the husband.⁹⁷ The parties to a maintenance application having been proved as living together for a long time, an application for maintenance cannot be dismissed on the ground that the date of solemnisation of the marriage is not mentioned.⁹⁸

The High Court of Andhra Pradesh has taken a contrary view.⁹⁹ There are conflicting views as to whether any interim maintenance can be granted by the court pending a wife's application to sue in *forma pauperis*.¹ The

93 *Krishna Lal v Sudarshan Kumari* (1978) 80 PLR 147; *Arun Kumar v Anjana* AIR 1984 Cal 49 (territorial jurisdiction).

94 *D Udayar v Rajarani* AIR 1973 Mad 369; *Jyoti Prakash v Chameeli* AIR 1975 Cal 260; *Madhukar v Bhima* AIR 1983 Bom 480, also see *Somanath v Savitri* AIR 1987 Ori 251, Cf *Ramchandra v Shebatta Dei* AIR 1977 Ori 96 (only in extraordinary circumstance); *Gajapati v Dukhnashini* AIR 1984 Ori 166; *Debi Prasad v Sandhya Devi* AIR 1985 Gau 97 (wife's application for increasing child's maintenance); *Baliram v Radhika Devi* AIR 1980 Pat 67; *Subash Chandra v Maluvi* AIR 1985 Ori 284; *Neelam Malhotra v Rajinder Malhotra* AIR 1994 Del 234; *Khadal Penthi v Hulash Dei* AIR 1989 Ori 137 (FB).

95 *G Appanna v G Seethamma* AIR 1972 AP 62; Cf *Simbachalam v Papamma* AIR 1973 AP 31; *V Santhanam v S Sathya* AIR 2003 Mad 94.

96 *P Srinavasa Rao v P Indira* AIR 2002 AP 130 (FB).

97 Quoted with approval in *K Shankare Gowda v Bharathi* AIR 1975 Kant 17, *Tarini v Gouri Gupta* AIR 1968 Cal 563; *Jain v Jain* AIR 1968 Cal 405. Cf *Ramchandra v Snehalata Dei* AIR 1977 Ori 96 (only in extraordinary circumstances).

98 *Basanti Mohanty v Parikshit Rout* AIR 2003 Ori 20.

99 *G Appanna v G Seethamma* AIR 1972 AP 62.

1 *Derinder Singh v Harminder Kaur* AIR 1984 P&H 40, *Guan Devi v Amar Nath* (1975) ILR 1 Del 811.

provisions of this section are not inconsistent with the provisions of s 24 of the Hindu Marriage Act and is, therefore, not hit by s 4(b) of the Act.²

SUB-SECTION (2): RIGHT TO SEPARATE RESIDENCE AND MAINTENANCE

Prior to the passing of the Hindu Married Women's Right to Separate Residence and Maintenance Act 1946, it was held in numerous court decisions that a wife, though normally bound to remain under the roof and protection of the husband, could claim separate residence and maintenance, if she established that by reason of his misconduct or by his refusal to maintain her in his own place of residence or other justifying cause, she was compelled to live apart from him (§ 555, Vol I). The Act of 1946 gave a statutory recognition to this right, and at the same time liberalised the law in certain respects in her favour. The text of s 2 of that enactment has been set out in § 555A (Vol I) and it will be noticed that the grounds set out in sub-s (2) of the present section are substantially the same as under the enactment of 1946 which, in view of the present Act, is now repealed.

When a house property is jointly owned by two brothers and one of them parts with his undivided interest in the property, if the wife of such coparcener is residing in the building during the pendency of a matrimonial dispute, the right of the wife to reside in such property continues till the determination of the matrimonial proceedings. She cannot be held to be a trespasser or a licensee of such premises.³ This provision has to be read in conjunction with the provisions of s 28 as regards the right of dependants to recover maintenance. The right of a wife to separate residence and maintenance is personal, and not heritable.⁴

CLAUSE (A) DESERTION

A Hindu wife is entitled to live separately from her husband and claim maintenance, if he is guilty of desertion. The expression 'desertion' represents a legal conception, and is very difficult to define as evident from notes under s 13 (1)(ib). It has been said more than once that no judge has ever attempted to give a comprehensive definition of desertion, and that probably, no judge would ever succeed in doing so, but among the descriptions of desertion, one which has always appealed to courts trying matrimonial causes is that 'desertion' is a 'a withdrawal not from a place, but from a state of things'. What amounts to 'abandoning' the wife in the context of this

² *Vinod Kumar Kejriwal v Usha Kejriwal* AIR 1993 Bom 160 (power to grant maintenance implicit and ancillary to power to entertain suit for it).

³ *Basudeb Sarkar v Chhaya Sarkar* AIR 1991 Cal 399.

⁴ *Sheela Rani v Jagdish Chander* AIR 2004 Del 158.

clause must depend on the facts and circumstances of each case.⁵ The clause aims at giving the meaning of desertion as abandonment of the wife by the husband without reasonable cause, and without her consent or against her will or wilful neglect of the wife by the husband. A large body of case law has developed around the legal significance of the expression both in England and in India, and the broad rules deducible from the same will be of assistance and guidance in cases which fall for determination under the present section, though of course, opinion in the context of enactments even slightly differently worded must always be read with the caution most commonly needed in their application to cases arising in different circumstances and varied situations. It will be noticed that the language of the present clause is intended to give a wide, and comprehensive import to the expression. There are, of course, some distinguishing features between the two provisions, and the present provision in cl (a) cannot be read as controlling the operation of the present s 13 (1)(ib) of the Hindu Marriage Act.⁶

A decree of divorce obtained by the husband on the grounds of desertion, but one, which has not become final, will not disentitle the wife to claim maintenance under this provision. In the eventuality of the decree becoming final, since it cannot be said that desertion continues, such application for claiming maintenance would be maintainable.⁷ This interpretation has been held *per incuriam* by the High Court of Bombay,⁸ and in view of the ruling of the Supreme Court in *Chand Dhawan v Jawaharlal Dhawan supra*, where it has been held that once a decree dissolving the marriage is passed, an order for maintenance would follow under that section.

Similarly, if the husband forces the wife to live a life of isolation, it would amount to desertion within the meaning of this section, entitling the wife to relief under the provision.⁹ A spouse will not be absolved of paying maintenance when desertion by him is proved, but he has not taken steps for restitution.¹⁰

CLAUSE (B): CRUELTY

A Hindu wife is also entitled to live separately from her husband and claim maintenance on the ground that he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with the husband. The legal conception of cruelty and the degree of cruelty necessary to afford a ground to the wife to claim separate

5 *Laxmi Sabuni v Maheswar Sabu* AIR 1985 Ori 11.

6 *Robini Kumari v Narendra Singh* AIR 1972 SC 459.

7 *Vabilal v Minaben* AIR 1995 Guj 88.

8 *Panditro Kalure v Gayabai* AIR 2001 Bom 445.

9 *Neelam Singh v Narain Singh* AIR 1995 All 215.

10 *Vasantha v Chandran* AIR 2003 Mad 214.

maintenance and residence under the present clause, it will be noticed, has been left to be gathered from general principles, and the legislature has only purported to lay stress on the criterion to be applied, namely, reasonable apprehension in the mind of the wife that it will be harmful or injurious to her to live with her husband. There is nothing in the language of the clause to show that beyond adding that criterion, any comprehensive definition has been laid down. This is just as well since actions of men are so diverse and infinite that it is almost impossible to expect a definition exclusive or inclusive, which will aptly meet every particular act or conduct, and not fail in some circumstances. Though the clause does not in terms so state, it is abundantly clear from the language used that the application of the rule must depend on the circumstances of each case. It would also seem to follow from the word 'treated' that what is contemplated is a mode of dealing with or behaviour towards the wife, which must be wilful. Without attempting to define 'cruelty' it may be said that to amount to cruelty in the present context, there must be such wilful treatment of the wife by the husband, which causes suffering in body or mind, whether in realisation or apprehension in such a way so as to render cohabitation harmful or injurious, having regard to the circumstances of each case, keeping always in view the character and condition of the parties. It is necessary to bear in mind that the legal conception of treatment which is cruel, comprises two distinct elements: firstly the ill-treatment complained of; and secondly, the resultant danger or apprehension thereof. It would be inaccurate and liable to lead to confusion if the word 'cruelty' used in the clause is understood apart from its effect on the wife. Reference may be made to notes under s 13(1)(ia): Cruelty.

CLAUSE (C): LEPROSY

A Hindu wife is also entitled to live separately from her husband and claim maintenance under the present section from him on the ground that he is suffering from a virulent form of leprosy. It will be noticed that the clause is worded in the present tense. It is enough that the ground exists at the date when the claim for separate maintenance and residence is made by the wife, regardless of whether the disease started before or after the coming into force of the Act. Reference may be made to the notes under s 13(1)(iv) of the Hindu Marriage Act 1955, where the expression 'virulent and incurable form of leprosy' has been used.

CLAUSE (D): HUSBAND HAVING ANOTHER WIFE

This Act and more particularly, this section deals with the right of a wife to claim maintenance under the circumstances enumerated therein, while living separately, without forfeiting her claim to maintenance. This sub-section in

particular, deals with the entitlement of a wife to claim maintenance if there is any other wife living.

The interpretation of this sub-section has resulted into conflicting judicial pronouncements qua the entitlement of a second wife to claim maintenance from the husband after the commencement of the Hindu Marriage Act and this Act, when the first wife is living. The High Court of Madras had held that this section would apply only in case of a marriage solemnised before this Act came into operation.¹¹ The Andhra Pradesh High Court had earlier taken the view that the second wife would be entitled to claim maintenance under this provision.¹² The High Court of Calcutta has taken the view that the second wife would not be so entitled.¹³ The Madhya Pradesh High Court as well as the Bombay High Court had in the context of ss 24–25 of the Hindu Marriage Act, and also taking into consideration the present provision had expressed the view that the expression ‘wife and husband’ used in the Act, cannot be given a strict literal meaning so as to convey only a legally married wife and husband. It would encompass a person claiming to be a wife or a husband. It has also been held that the words used in the section would refer to parties who have gone through the ceremonies of a marriage, and the court can make an order of maintenance at the instance of the second wife.¹⁴

The Andhra Pradesh High Court in a recent full bench decision overruled the earlier decision, while holding that the second wife is not entitled to maintenance under this section, since, after the coming into force of the Hindu Marriage Act, a bigamous marriage is prohibited. The second marriage being void, the second wife cannot claim maintenance under this section since the parties to the marriage will not have the status of a legally married husband and wife.¹⁵

The decision of the High Court of Bombay in *Krishnakant's case* supra was overruled by a decision of a Full Bench in *Bhausabeh v Leelabai*,¹⁶ which took the view that a petition challenging the nullity of a marriage by virtue of s 5(1) of the Hindu Marriage Act, is a petition seeking a declaration of nullity of the marriage and is not a petition affecting the marital status and thus, would not entitle the wife of such a void marriage to the relief of maintenance. The court held that the words ‘any decree’ in s 25 of the Hindu Marriage Act cannot be construed to mean ‘every decree’ so as to entitle such spouse to maintenance. The Supreme Court has in the context

11 *Annamalai v Perumayee Ammamal* AIR 1965 Mad 139, 141.

12 *C Obula Konda Reddy v C Pedda Venkata* AIR 1976 AP 43.

13 *Ranjit Bhattacharya v Sabita* AIR 1996 Cal 301.

14 *Taxmbai v Ayodhya Prashad* AIR 1991 MP 47, *Krishnakant Vyas v Reena* AIR 1999 Bom 127.

15 *Abayolla M Subba Reddy v Padmamma* AIR 1999 AP 19 (FB), *Solomon v Jami Bai* AIR 2004 Mad 460 (void marriage—second wife not entitled—case of non-access not made out.)

16 *Bhausabeh v Leelabai* AIR 2004 Bom 283 (FB).

of entitlement to a spouse of a void marriage, now held,¹⁷ that once there is a decree of nullity in respect of a void marriage, such spouse would be entitled to maintenance. The court taking note of its earlier decision in *Chand Dhawan v Jawaharlal Dhawan*,¹⁸ held that decision clearly stipulated that once there is a decree bringing about a disruption of the marital tie, *including a decree nullifying a void marriage*, the spouse was entitled to maintenance. This, it is submitted is in the context of a decree of nullity of such marriage as is envisaged under s 11 of the Hindu Marriage Act. Attention is invited to the commentary under s 25 of that enactment.

The scope of entitlement to maintenance under that enactment and section operates in different circumstances, as compared to entitlement to maintenance under this provision. Section 25 of the Hindu Marriage Act, applies on the disruption of the marriage tie, as explained and interpreted by Supreme Court in the above decision, whereas this section applies in cases where the marriage subsists and confers upon the wife the right to claim maintenance without seeking a disruption of the marriage tie. It is submitted that both enactments, therefore, envisage different situations, the provision of s 25 of the Hindu Marriage Act, applying and becoming operative on the disruption of the marriage and this provision applying contra, to a situation when the tie subsists. Infact, the Supreme Court has, while analysing the provision of the Hindu Marriage Act in *Ramesh Chandra's* case while placing reliance upon *Chand Dhawan's* case stated that 'where the marriage is not dissolved by any decree of the court, resort to section 25 of the Act is not allowed as any of the spouses whose marriage continues can resort to other provisions like Section 125 of the Criminal Procedure Code or provisions of the Hindu Adoptions and Maintenance Act'. It is thus, submitted that as a result of the wording of the present section, the claim of maintenance by a wife, during the subsistence of the prior marriage of the husband, cannot be ruled out as is expressed, explained and interpreted hereunder.

Prior to the Hindu Marriage Act 1955 came into force, polygamous marriages were permissible and recognised. On the coming into force of that Act, the legislature enacted s 13(2), stipulating the right of a wife if there was any other wife living, to seek dissolution of the marriage on that ground. That enactment also stipulated that a bigamous marriage entered into after the coming into force of that Act, was void.

It appears that though the Hindu Marriage Act prohibits a second marriage during the lifetime of the first wife, the present section does not clearly state that it is only the legally married wife who can claim maintenance in the above circumstances. If that had been the language of the section, the claim of the second wife would necessarily fail. This Act came into force on the 21 December 1956, after the Hindu Marriage Act 1955, which came into force

17 *Ramesh Chandra Daga v Rameshwari Daga* JT 2004 (10) SC 366.

18 *Chand Dhawan v Jawaharlal Dhawan* (1993) 3 SCC 406.

on 18 May 1955. At the time that this Act came into force, the legislature had enacted the Hindu Marriage Act, which prohibited a second marriage during the subsistence of the first one. The legislature was, therefore, conscious of the fact that the Hindu Marriage Act prohibited a bigamous marriage, and yet, the present section as it stands today, had been enacted. It is submitted that if the legislative intent in the context of this section were to grant the right of maintenance only to a legally married wife, it would have clearly stated so. In the context of the wording of *this* section as it stands at present, the claim for maintenance by the 'second wife' cannot therefore, be discountenanced. It is worthwhile to note that this has been construed as a beneficial piece of legislation. It also appears that the words 'husband' and 'wife' in the context of this section cannot be read to convey only a legally wedded wife and husband, but be read as conveying the meaning of persons who have undergone the ceremonies of a marriage. Neither this enactment, nor the Hindu Marriage Act, defines the word 'wife'. In the absence of such a definition, it appears that the word must be construed as a woman united to a man by marriage.¹⁹ In the context of this enactment, therefore, the word 'wife' must be taken as and in common parlance, and, therefore, a married woman. It, therefore, appears that the legislative intent in the context of this section, was not to numerically segregate the wives by virtue of their marriage being either prior, or subsequent in point of time. It seems that the legislative intent was not to restrict the right of maintenance only to the wife who was legally married. This so transpires because the words used in the section are 'any other wife living', which can be construed to mean a wife other than the wife claiming maintenance. The provision as it stands today is widely worded so as to sustain a claim of maintenance by a 'second wife'. If, therefore, the section were to be read as conferring the right to maintenance only upon the legally married wife, it would have to be read otherwise so as to include only the legally married wife's entitlement to claim maintenance in the above circumstances. The wording of the section as it stands today, cannot be held to altogether exclude the claim of the 'second wife'. The claim is maintainable irrespective of the fact that the other marriage had taken place after or before the marriage of the applicant wife, provided the other wife is living. Attention is invited to the commentary under s 25 of the Hindu Marriage Act, where this issue is discussed. The rule laid down in this clause is absolute, and it will make no difference that the applicant had acquiesced in or even consented to the other marriage. It is no answer to a claim for maintenance under this provision that the claimant wife is living separately without the consent of the husband or that there was willful neglect of the husband by her.²⁰

A question may arise as to what would be the position if the 'other wife'

¹⁹ *Blacks Law Dictionary* 6th edn.

²⁰ *Siddagouda v Parvathamma* AIR 1965 Mys 299. *Kiran Bala v Bankim Chandra Saha* AIR 1967 Cal 603

dies or the husband's marriage with her is dissolved. In *Robini Kumari v Narendara Singh*,²¹ the Supreme Court doubted whether in such a case if the husband calls upon the 'wife' to return to him and she does not return, she can still claim maintenance from him under this clause.

The words 'any other wife living' in this clause are of sufficiently wide connotation to include any wife other than the wife claiming maintenance under the section. The meaning is not confined to a wife who is junior to the wife who is the claimant;²² nor is it necessary that the husband and the other wife should be living together. The word 'living' here means alive, and not living with the husband²³

It is submitted that this section requires to be amended.

The plaintiff wife need not lead any evidence if the husband in his written statement has admitted the factum of the other wife being alive even though there may be some variance between the case of the parties which may be of no consequence.

A second wife who had abandoned her husband for no justifiable reason and not for immoral purposes, would be entitled to live separately from the husband by virtue of the present clause, and can claim maintenance under the present provision.²⁴ The court may, however, in any such cases, in the exercise of its discretion, fix the amount of maintenance bearing in mind the conduct of the wife who claims maintenance.²⁵

CLAUSE (E): KEEPING A CONCUBINE

A Hindu wife is also entitled to live separately from her husband and claim maintenance from him on the ground that he keeps a concubine in the same house in which she is living or habitually resides with a concubine elsewhere. In the second part of this clause, the emphasis is on 'habitually' and not so much on residence.²⁶ It is not necessary that the husband should have actually shifted his residence to the place where the concubine lives. In *Bhadra Reddy v Shanthamma*,²⁷ it was held that a decree for maintenance can be passed under the general cl (g) even if the case could not fall under the cl (e), though the wife was staying away.

CLAUSE (F): 'CEASED TO BE A HINDU BY CONVERSION'

The term 'Hindu' in this clause must be understood in the wide sense given to it in s 2, as will be seen from sub-s (3) of that section. So, a husband

21 AIR 1972 SC 459, 463.

22 *Jagamma v Satyanarayanamurthi* AIR 1958 All 582.

23 *Kalamati v Ratan Chand* AIR 1960 All 601.

24 *Ram Parkash v Savitri Devi* AIR 1958 Punj 87.

25 *Ram Prakash v Savitri Devi* supra; *Satyanarayanamurthi v Jagamma* AIR 1962 All 139

26 *Kesarbai v Haribhau* AIR 1975 Bom 115.

27 AIR 1987 Kant 209.

continues to be a 'Hindu' even though he may have been converted from any one to any other of the four religions: Hinduism, Jainism, Buddhism and Sikhism, and no relief can be granted under this clause to the wife simply on that ground. Conversion in the present context implies that the husband has voluntarily relinquished his religion and adopted another religion after a formal ceremonial conversion. A Hindu does not cease to be a Hindu merely because he professes a theoretical allegiance to another faith or is an ardent admirer and advocate of such religion and its practices. However, if he abdicates his religion by a clear act of renunciation and adopts the other religion, he would cease to be a Hindu within the meaning of this clause. Reference may be made to the notes under s 13(1)(ii) of the Hindu Marriage Act 1955.

CLAUSE (G)

In addition to the specific grounds mentioned in cll (a)–(f) of sub-s (2) of the present section, a Hindu wife is also entitled to live separately from her husband, and claim maintenance from him if there is any cause justifying her living separately. Thus, for instance, conduct falling short of cruelty may justify the wife in leaving the husband and claiming maintenance from the husband if the court is satisfied that she was justified in the facts and circumstances of the case in living separately from the husband. If the conduct of the husband is such that in the opinion of the court the wife has justifiable reason for withdrawal from the society of the husband, the court would grant relief to the wife by making an order for maintenance under this clause, but not otherwise.²⁸ It seems that any ground which would support an application for restitution of conjugal rights by her would afford a justifying cause to the wife for her living separately from her husband, and entitle her to claim maintenance from the husband. She is not bound to ask for decree for restitution of conjugal rights or for any other relief under the Act and may prefer for any reason of her own, to claim the right of separate maintenance and residence on any of the ground mentioned in the section.

PAST MAINTENANCE

Reference may be made to § 579(2) (Vol I). As to abandonment or waiver, see *TPKN Chettiar v Achiyayee Ammal*.²⁹

28 *Sobha Devi v Bhima* AIR 1975 Ori 180 (mere drinking habit of husband); *Kanthimathi v SP Iyer* AIR 1971 Ker 121 (*de facto* separation of husband due to exigencies of employment); *Subbegowda v Hownamma* AIR 1984 Kant 41

29 AIR 1975 Mad 202 (the matter will of course, depend upon the entire facts and circumstances of the case); *Meera v Sukumar* AIR 1994 Mad 168 (detaining wife in mental asylum and attempt to dispossess wife from house)

SUB-SECTION (3): UNCHASTE WIFE: WIFE CONVERTED TO ANOTHER RELIGION

This sub-section lays down that wife who is herself unchaste or who has herself renounced Hinduism by embracing any other faith, cannot claim the right of separate residence and maintenance enacted in sub-s (2). It will be noted that this sub-section does not say that an unchaste woman is not entitled to any maintenance at all from the husband. What the sub-section rules is that she cannot claim separate residence and maintenance under this Act. Under Hindu law as previously applied, a wife who has been unchaste did not wholly forfeit her right to claim maintenance. If she went back to the husband and offered to live with him, this refusal to take her back, entitled her to demand maintenance. Of course, in awarding maintenance to the wife in any such case, the court would take into consideration among other factors, the conduct of the wife. Reference may be made to § 555 (Vol I). Reference may also be made to s 24 *post*. (Also see notes under s 225 of the Hindu Marriage Act 1955.)

Order under s 125 of the Code of Criminal Procedure—When a spouse claims maintenance under s 125 of the Code of Criminal Procedure 1973 on certain grounds, it would be appropriate for that court to bear in mind the circumstances for claim of maintenance under the present provision.³⁰ Attention is also invited to notes under s 24 of the Hindu Marriage Act under the heading ‘Criminal Procedure Code’.

Remedies under s 18 of this Act and s 125 of the Code of Criminal Procedure, are co-existent, and therefore, any order under that section cannot foreclose a remedy under this enactment.³¹

19. Maintenance of widowed daughter-in-law.—(1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law:

Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance—

- (a) from the estate of her husband or her father or mother, or
- (b) from her son or daughter, if any, or his or her estate.

(2) Any obligation under sub-section (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not

³⁰ *Rajathi v C Ganesan* AIR 1999 SC 2374.

³¹ *Aber Mensi Ramsi v Aberant Bai Mant Jetha* AIR 2001 Guj 148.

obtained any share, and any such obligation shall cease on the re-marriage of the daughter-in-law.

MAINTENANCE OF WIDOWED DAUGHTER-IN-LAW

The right of a widowed daughter-in-law, when she did not succeed to her husband's property was of considerable importance and consequence. The position and right of a widow both under Mitakshara and Dayabhaga law has been stated in the relevant chapters. The rights of the three widows—one of whom was the widow of a predeceased son—mentioned in the Hindu Women's Right to Property Act 1937, to claim maintenance, were not abolished by that Act in express terms, but the effect was that there was little occasion for them to claim maintenance since they were entitled to a share on partition. There was nothing, however, in that Act to compel the widow to sue for partition where the deceased husband was member of a joint family and she could, if she so desired, claim only maintenance without having recourse to the remedy of partition. The position and rights of a widow and particularly of a widow of a predeceased son in matters of inheritance, have been materially changed by the Hindu Succession Act 1956, and the question of the right to maintenance of the widow of a predeceased son must now be considered in the context of the provisions of that Act. She is one of the preferential heirs of the father-in-law mentioned in class I of the schedule to that Act and inherits simultaneously among others with the widow, son, daughter and mother of the deceased. If her husband was a member of a Dayabhaga coparcenary, her position and rights as an heir of her husband are fully recognised. If her husband was at the time of his death a member of a Mitakshara coparcenary, she becomes entitled by operation of s 6 of the Act to get a share out of the interest of the deceased husband in the coparcenary property on the footing of a notional partition deemed to have taken place immediately before his death. The same is the position in case of death of the father-in-law who at the time of his death was a member of a Mitakshara coparcenary. The rights of the widowed daughter-in-law to claim maintenance under the law as it stood prior to the Hindu Women's Rights to Property Act 1937, under the decided cases, are considered in § 564(2) and 564(3) (Vol I). Reference may also be made to § 35 (Vol I), and the notes under the Hindu Women's Rights to Property Act 1937 [§ 35 (Vol I)].

This section is equally applicable to a daughter-in-law governed by Dayabhaga School.³²

A father-in-law is bound to maintain his daughter-in-law, if and as long as the case falls under the section.³³

³² *Kansirlal Pramanik v Pushparani Pramanik* AIR 1979 Cal 172.

³³ *Jagdish Singh v Additional District Judge* AIR 1979 All 24; *Annamuthu v Gandhiammal* AIR 1977 Mad 372 (father-in-law in possession of entire property of the joint family of himself and the deceased husband of the claimant)

The present section deals with the right of maintenance of a widowed daughter-in-law, whether married before or after the commencement of this Act. She can claim maintenance from the father-in-law only if she is unable to obtain maintenance—

- (1) from her own resources; or
- (2) out of the estate of her husband or her father or her mother;³⁴ or
- (3) from her son or daughter of his or her estate.

The right to claim maintenance from the father-in-law, in the circumstances stated above, is further conditional upon the father-in-law having in possession coparcenary property,³⁵ out of which the widowed daughter-in-law had not obtained any share. If the evidence points to the fact that there is no coparcenary property, a claim under this section cannot enure.³⁶ The High Court of Punjab and Haryana has, however, held that she is entitled to claim maintenance from the father-in-law's self acquired property or from his donee.³⁷ The proviso to this section has been read to mean that the widowed daughter-in-law has a right of being maintained by her father or mother during their respective lives, apart from her claim against the estate of the husband. This, on the reasoning that the words 'the estate of' before the words 'her husband' are not to be read into the latter part of the clause as 'estate of her father or mother'. The right against the father can be enforced against his property. The intention of the legislature in not using the words 'estate of her father' in proviso (a) to s 19(1) is deliberate, since the right of a widowed daughter is covered under s 21 (vi) read with s 22(2). This proviso creates a personal right against her father during his life time. Therefore, any property given in lieu of maintenance would fall within s 14(1) of the Succession Act being in recognition of a pre-existing right recognized by the father.³⁸ Attention is invited to notes under s 14 of the Hindu Succession Act *supra*. The right to claim maintenance envisaged in sub-s (2) can be enforced even if the daughter-in-law, though entitled to claim a share of the joint family property does not choose to do so.³⁹

It is implicit in the rule laid down in this section that a daughter-in-law whose husband is alive has no right, moral or legal, to claim maintenance from her father-in-law.

34 There must be legal right to obtain maintenance from the person of mother.

35 Where the father-in-law has both self-acquired and coparcenary property, see *Jal Kaur v Pal Singh* AIR 1961 Punj 391 *Gurdip Kaur v Ghamed Singh* AIR 1965 Punj 238 (FB); *Samu Bai v Magan Lal* AIR 1961 Raj 207; *Sachchanand v Nisha* AIR 1990 MP 247; *Raj Kishore Mishra v Meena Mishra* AIR 1995 All 70.

36 *Daljit Singh v S Dara Singh* AIR 2000 Del 292.

37 *Balbir Kaur v Harinder Kaur* AIR 2003 P&H 174.

38 *Balvant Kaur v Chanan Singh* AIR 2000 SC 1908 (overruling *Chanan Singh v Balvant Kaur* AIR 1984 P&H 203).

39 *Animuthu v Gandbiammal* AIR 1977 Mad 372.

The right envisaged in this section to claim maintenance ceases on her remarriage.

This section is prospective and retrospective.

This section must be read with s 23 which lays down that it shall be in the discretion of the court to determine whether any and if so what maintenance shall be awarded under the provisions of this Act. This section must also be read with s 22 *post* which relates to the right of dependants of a deceased person to claim maintenance from heirs who have inherited his estate (by will). Section 21(vii) mentions widowed daughter-in-law as one of the dependants of a deceased Hindu.

INTERIM MAINTENANCE

See notes under s 18 and 20.

20. Maintenance of children and aged parents.—(1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earning or property.

Explanation.—In this section ‘parent’ includes a childless step-mother.

MAINTENANCE OF CHILDREN AND AGED PARENTS

A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents, whether he possesses any property or not. The obligation to maintain these relations is personal, legal and absolute in character, and arises from the very existence of the relationship between the parties.⁴⁰ The section is couched in broad terms. Read with s 21, this section defines the persons who are entitled to maintenance. Larger questions may sometimes arise for determination, when courts may be called upon to decide complex issues of parentage in the context of maintenance, as in the undermentioned case, where a person claimed to be a son, and prayed for maintenance and for subjecting the alleged father to

⁴⁰ *State of Haryana v Santra* AIR 2000 SC 1888 (unwanted child—also entitled to be maintained. No difference between legitimate child and unwanted child); *Kishan Dutt Verma v Baby Parul* AIR 2004 Del 366.

a DNA test for proving the parentage; on the facts establishing the marriage of the plaintiff's mother with another person, no such tests were directed, and consequently no maintenance was granted.⁴¹ As regards right to privacy, attention is invited to the decision of the same court in *X v Hospital Z*.⁴² Section 18 of the present Act reiterates the right of a wife to claim maintenance and support from her husband. The present section gives statutory form to the legal obligation of a Hindu also to maintain his minor children and his aged or infirm parents. The obligation is absolute and does not depend on his means. However, the law laid down in the section goes further than that and rules that not merely a male Hindu—as was the law previously applicable—but a female Hindu as well is now under a legal obligation to maintain legitimate or illegitimate children and aged or infirm parents.⁴³

The visitation right conferred on the spouse can be curtailed till the order of maintenance is complied with.⁴⁴ Neither of the parents can escape liability by raising the plea that the responsibility of maintenance has been taken over by the other parent.

The obligation is not cast on a brother. Also, in a case falling under s 22, a brother is not legally bound to maintain a sister.⁴⁵

The section while recognising the rights of the enumerated persons to claim maintenance does not say that liability to pay the amount of maintenance can be made a charge on the property of the other party. However, it does not exclude the application of s 39 of the Transfer of Property Act 1882, to a case falling under the section.

The Hindu law, as previously applicable, did recognise the right of a illegitimate son of a Hindu by a Hindu woman to claim maintenance. The law on the the subject was, however, not quite uniform. There was no provision in Hindu law for maintenance of illegitimate daughters; but they could claim maintenance from the putative father under s 488 of the Criminal Procedure Code 1973. The rights created by this section and s 22 are only prospective, and not retrospective. These provisions do not create any right in favour of an illegitimate daughter to claim maintenance against the estate of the father who died prior to the commencement of the Act.⁴⁶

A claim for maintenance under the section can be made by an illegitimate child born of adulterous intercourse,⁴⁷ or a child born of a void marriage.⁴⁸ Sub-sections (1) and (2) must be read together, and an order under sub-s (2)

41 *Master X v Y* AIR 2003 Del 195.

42 AIR 2002 Del 217.

43 *Thulasikumar v Raghavan* AIR 1985 Ker 20, 23.

44 *Thulasikumar* supra.

45 *S Chellaiyan v Sathiakrishnan* AIR 1982 Mad 148.

46 *Jaiwanti Mafatlal v Arvind N Mafatlal* AIR 1968 Bom 314.

47 *Kalla Maistry v Kanniammal* AIR 1963 Mad 210.

48 *Solomon v Jaini Bai* AIR 2004 Mad 460.

can be made only against a Hindu father or a Hindu mother. The Act applies only to Hindus.⁴⁹

The present section lays down some very simple rules and casts the obligation of maintaining minor children, legitimate or illegitimate, on the father,⁵⁰ as well as the mother; and it also rules that a Hindu male and female are both under the legal obligation to maintain their aged or infirm parents. Maintenance includes provisions for food, clothing, residence, education of the children and medical attendance and treatment (s 3(b)(i)); and in case of an unmarried daughter also, the reasonable expenses of and incident to her marriage (s 3(b)(ii)).⁵¹ Recognising the fact that an unmarried daughter is entitled to more financial assistance, in view of the fact that she may get married in future, the Supreme Court has held that such unmarried daughter is entitled to get more maintenance.⁵²

The obligation to maintain parents and an unmarried daughter, extends in so far as any one of them is unable to maintain himself or herself out of his own earning or other property. There can be no absolute test for determining whether the parent is 'aged or infirm'. It would depend on the facts and circumstances of the case. In this context, importance would also be attached to the factor 'unable to maintain himself or herself'.⁵³ The expression 'parents and children' in the present context would include the adoptive father and adoptive mother and adopted children respectively. A stepfather is not entitled to claim maintenance from a stepchild, but a childless stepmother can claim maintenance from the stepson or stepdaughter. This section must be read with s 23 which lays down that it shall be in the discretion of the court, whether any and if so what, maintenance shall be awarded under the provisions of this Act. This section must also be read with s 22 *post*.

The provision for maintenance of a mother under this section does not, of course, effect the mother's right to claim a share on partition under ordinary Hindu law,⁵⁴ or her rights under the Hindu Succession Act.

INTERIM MAINTENANCE

An order of interim maintenance can be made in a case falling under this section. If a *prima facie* case is made out the court will grant interim maintenance, although there is a denial of the relationship of the right by the parent.⁵⁵ Reference may be made to notes under s 18 *supra*.

49 *Contra Adam v Gopala Krishnban* AIR 1974 Mad 232.

50 *Krishnakumari v Varalakshmi* AIR 1976 AP 365 (court can create a charge)

51 *Chandra Kishore v Nanak Chand* AIR 1975 Del 175 (this applies whether there is any joint family property or not).

52 *Sneh Prabha v Ravinder Kumar* AIR 1995 SC 2170.

53 *Munni Devi v Choti* AIR 1983 All 444.

54 *Samu Bai v Magan Lal* AIR 1961 Raj 207; *Vishwanath v Prem Nath* AIR 1975 J&K 92.

55 *Indra Mal v Babu Lal* AIR 1977 Raj 160.

SUB-SECTION (3)

Sub-section (3) lays down no limitation as to the age of the unmarried daughter. It gives a statutory recognition to the rule under the prior law that a Hindu male or female is under an obligation to maintain his or her unmarried daughter regardless of age, so long as she is not able to maintain herself.⁵⁶

21. Dependants defined.—For the purposes of this Chapter ‘dependant’ mean the following relatives of the deceased:

- (i) his or her father;
- (ii) his or her mother;
- (iii) his widow, so long as she does not re-marry;
- (iv) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor; provided and to the extent that he is unable to obtain maintenance in the case of a grandson from his father’s mother’s estate, and in the case of a great-grandson, from the estate of his father or mother or father’s father or father’s mother;
- (v) his or her unmarried daughter, or the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried: provided and to the extent that she is unable to obtain maintenance, in the case of a grand-daughter from her father’s or mother’s estate and in the case of a great-grand-daughter from the estate of her father or mother or father’s father or father’s mother;
- (vi) his widowed daughter: provided and to the extent that she is unable to obtain maintenance—
 - (a) from the estate of her husband; or
 - (b) from her son or daughter if any, or his or her estate; or
 - (c) from her father-in-law or his father or the estate of either of them;
- (vii) any widow of his son or of a son of his predeceased son, so long she does not remarry: provided and to the extent that she is unable to obtain maintenance from her husband’s estate, or from her son or daughter, if any, or his or her estate, or

⁵⁶ *Wali Ram v Mukhtiar Kaur* AIR 1969 P&H 285.

- in the case of a grandson's widow, also from her father-in-law's estate;
- (viii) his or her minor illegitimate son, so long as he remains a minor;
 - (ix) his or her illegitimate daughter, so long as she remains unmarried.

WIDOWED DAUGHTER OF A DECEASED

Clause 21(vi) stipulates that a widowed daughter of the deceased is a dependant, to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter or their estate; or her father-in-law or his father; or the estate of either of them. For this purpose she is dependent on the deceased. As per this section, she gets a legal right of being maintained out of the estate inherited by any of the heirs of her deceased father. This is an inherent right of the widowed daughter.⁵⁷

22. Maintenance of dependants.—(1) Subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependant of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part, the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act.

Sections 20, 21 and 22 may be read together. They are in terms prospective as observed by the Supreme Court.⁵⁸

⁵⁷ *Bilvant Kaur v Chanan Singh* AIR 2000 SC 1908.

⁵⁸ *Gopala Rao v Sitharamamma* AIR 1965 SC 1970, *Lakshmi Narasamba v J Sandranma* AIR 1981 AP 88 (FB), *Mukta Bai v Kamalaksha* AIR 1960 Mys 182, *Jancanti Majatlal v Arvind N Majatlal* AIR 1968 Bom 314, *Gulabchand v Sheokaran* AIR 1964 Pat 45.

DEPENDANTS: MAINTENANCE OF DEPENDANTS

In the matter of persons who are entitled to claim maintenance under the present enactment, the scheme is to deal in the first place with the right of maintenance of wife from her husband (s 18); the right of maintenance of widowed daughter-in-law from her father-in-law (s 19); the right of maintenance of minor children (legitimate or illegitimate) from the father and mother (s 20). In all these cases, the right is against an existing person, husband, father-in-law, father, mother, son or daughter, as the case may be. After stating the right of all these persons, the Act proceeds in s 21 to define persons who are dependants of a deceased Hindu, and in s 22 lays down rules relating to the right of maintenance of dependants from the heirs of deceased Hindu or others who have inherited the estate of such deceased person. Section 21 and 22 may also be read with s 23 which lays down that it shall be in the discretion of the court, whether any, and if so what maintenance shall be awarded under the provisions of this Act. The principal general rule laid down in the present section is that a dependant of a male or female deceased Hindu who has not obtained any share in the estate of the deceased (dying after the commencement of this Act) is entitled to claim maintenance from those who take the estate.

The expression 'heirs' in this section includes all persons on whom the estate has devolved upon intestacy as well as under a testamentary instrument.⁵⁹ It is clear that the language of the sub-section of s 22 casts a legal obligation only on those who have taken the estate of the deceased.⁶⁰

The dependants of a deceased Hindu entitled to claim maintenance as stated above are—

- (i) his or her father;
- (ii) his or her mother;
- (iii) his widow (so long as she does not remarry);
- (iv) his or her minor son;
- (v) the (minor) son of his predeceased son;
- (vi) the (minor) son of predeceased son of his predeceased son;
- (vii) his or her unmarried daughter;
- (viii) the unmarried daughter of his predeceased son;
- (ix) the unmarried daughter of a predeceased son of his predeceased son;
- (x) his widowed daughter; (see notes under s 21 (vi) supra).
- (xi) the widow of his predeceased son (so long as she does not remarry);⁶¹

⁵⁹ *Gulazra Singh v Tej Kaur* AIR 1961 Punj 288.

⁶⁰ *S Chellarijan v S Sathiakrishnan* AIR 1982 Mad 148 (brothers had not inherited any estate of their father: no obligation on one brother to contribute towards marriage expenses of a sister incurred by another brother).

⁶¹ *Deoki Nandan v Girand Singh* AIR 1983 All 425.

- (xii) the widow of son of his predeceased son (so long as she does not remarry);
- (xiii) his or her illegitimate minor son;
- (xiv) his or her illegitimate daughter (so long she remains unmarried).

It will be noticed that a larger number of persons are included among the dependants of a male Hindu.

In case of the grandson, the right to claim maintenance as a dependant, and the extent of such right is conditional upon his being unable to obtain maintenance from his father's or mother's estate. In case of the great-grandson, the right to claim maintenance as a dependant and the extent of such right is conditional upon his being unable to obtain maintenance from the estate of his father or mother or father's father or father's mother. In case of a grand-daughter, the right to claim maintenance and the extent of such right is conditional upon her being unable to obtain maintenance as a dependant from the estate of her father or mother. In case of a great-grand-daughter, the right to claim maintenance as a dependant and the extent of such a right is conditional upon her being unable to obtain maintenance from the estate of her father or mother or father's father or father's mother. In case of the widowed daughter, the right to claim maintenance as a dependant and the extent of such right is conditional upon her being unable to obtain maintenance from the estate of her husband; her son or daughter; or the estate of her son or daughter; or from her father-in-law, or his father or the estate of either of them. In case of the widow of his son, the right to claim maintenance as a dependant and extent the such right is conditional upon her being unable to obtain maintenance on the estate of her husband; or from her son or daughter; or the estate of her son or daughter. In case of the widow of the son of his predeceased son, the right to claim maintenance as a dependant and the extent of such right is conditional upon her being unable to obtain maintenance from the estate of her husband; or from her son or daughter; or the estate of her son or daughter, or the estate of her father-in-law. As to stepson and stepmother, see the undermentioned decision.⁶² A destitute widowed daughter has a right of maintenance against her brother in absence of her in-laws capacity to maintain her.⁶³

WIDOW: REMARRIAGE

A widow would forfeit her right to maintenance on her remarriage as clearly laid down in s 22 read with s 21(iii) of the Act; but, these provisions cannot effect any gift of immovable property made

⁶² *Panna Lal v Fulemoni* AIR 1987 Cal 368.

⁶³ *Kota Varaprasad Rao v Kota Chinn Venkiah* AIR 1992 AP 1 (case law discussed)

by a husband in favour of his wife to be enjoyed by her after his death in lieu of maintenance without any power of alienation. Such a grant would remain operative despite remarriage or unchastity forfeiting her rights.⁶⁴

WIDOW OF A DECEASED COPARCENER

Sections 21 and 22 are not intended to affect the general rule of Hindu law that the widow of a deceased coparcener is entitled to maintenance out of the coparcenary property held by the surviving coparceners.⁶⁵

UNMARRIED DAUGHTER

Maintenance in case of an unmarried daughter—which could include marriage expenses,⁶⁶—is matter for which provision has been made in the Act and would be worked out under the provisions of the Act. An unmarried daughter who gets a share in her father's estate would not be further entitled for a provision for her marriage expenses in a suit for partition.⁶⁷

SISTER

A sister is not included in the list of dependants in s 21, but that does not in any way abridge her pre-existing right to claim maintenance from her brother who inherited the father's property. Her right has not been obliterated.⁶⁸

ILLEGITIMATE SON OF A SUDRA

Under Mitakshara law, prior to this Act, the illegitimate son of a *Sudra* had the right to claim maintenance as stated in § 551 (Vol I). Any such right, which vested in him, prior to his Act, is not estopped by these two sections. He is entitled to maintenance for life and not only during his minority, as would now be the case under s 21(viii) and s 22.⁶⁹

AVARUDDHA STRI

These two sections are prospective and not retrospective in their operation, and they do not destroy the right of an *avaruddha stri* to claim maintenance which had vested in her before the commencement of this Act, although

64 *Sankrerihala v Asita Barani* AIR 1977 Cal 289.

65 *Govardhan v Gangabai* AIR 1964 MP 168.

66 See definition in s 3(b).

67 *Karuppena v Chinna Nachammal* AIR 1974 Mad 329.

68 *Ramahal v Narayana Rao* AIR 1967 MP 86.

69 *Gopala Rao v Sitharamamma* AIR 1965 SC 1970.

she is not included in the list of dependants. (For *avaruddha stri* see § 553 (Vol I).)

SUB-SECTION (3)

The liability of the persons who have taken the estate of the deceased male or female Hindu to provide maintenance for any of the dependant of the deceased is not joint and several, but is proportionate to the value of the share or part of the estate received by each of such persons.

SUB-SECTION (4)

A person who is himself or herself a dependant of the deceased male or female and has taken a share or part of the estate of the deceased, is liable to contribute towards the maintenance of any other dependant who has not obtained any share or part in the estate of the deceased by testamentary or intestate succession. His or her proportionate contribution in any such case under sub-s (3) is, however, to be computed in such a manner that what remains with him or her of the share or part of the estate after his or her liability to make contribution is enforced, is not, in terms of money, less than what would have been awarded to him or her by way of maintenance as a dependant. The maintenance that might have been awarded to him or her if he or she had not taken a share or part of the estate would have to be assessed in terms of a gross payment for the purpose of balancing it against the value of the share or part of the estate taken by him or her. It is evident that the ascertainment of the amount of proportionate contribution by a dependant who has taken his or her share or part of the estate will not depend simply on any arithmetical calculations because the court will have to compute in terms of money the value of the amount of the notional maintenance that might have become awardable to him or her, and it seems that this may present considerable difficulty in some cases.

23. Amount of maintenance.—(1) It shall be in the discretion of the Court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in sub-section (2), or sub-section (3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to—

- (a) the position and status of the parties;

- (b) the reasonable wants of the claimant;
- (c) if the claimant is living separately, whether the claimant is justified in doing so;
- (d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;
- (e) the number of persons entitled to maintenance under this Act.

(3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to—

- (a) the net value of the estate of the deceased after providing for the payment of his debts;
- (b) the provision, if any, made under a will of the deceased in respect of the dependant;
- (c) the degree of relationship between the two;
- (d) the reasonable wants of the dependant;
- (e) the past relations between the dependant and the deceased;
- (f) the value of the property of the dependant and any income derived from such property; or from his or her earnings or from any other source;
- (g) the number of dependants entitled to maintenance under this Act.

ASSESSMENT OF QUANTUM OF MAINTENANCE PAYABLE UNDER THE PROVISIONS OF THE ACT

This section lays down three sets of rules relating to payment of maintenance under the various provisions of the Act:

- (1) it is left to the discretion of the court to decide whether any maintenance should be awarded:
 - (a) to a wife, widowed daughter-in-law, minor son, unmarried daughter or aged or infirm parents under ss 18–20 of the Act; or
 - (b) to any dependant of a deceased male or female Hindu under the provisions contained in ss 21 and 22 of the Act.
- (2) In exercising its discretion in the matter of assessment of the quantum of maintenance to be awarded to a wife, children or aged parents under the provisions of ss 18–20 of the Act, the court must have regard to the factors and circumstances set out in sub-s (2) of this section.
- (3) In exercising its discretion in the matter of assessment of the quantum of maintenance to be awarded to a dependant under the provisions

of ss 21 and 22 of the Act, the court must have regard to the factors and circumstances set out in sub-s (3) of this section.

The section cannot be read as an independent provision, but must be read with ss 21 and 22, which apply only to the estate of a person who died after the commencement of the Act. In case of estate of a person who died before the commencement of the Act, the old law will apply.⁷⁰

The scope of this section and s 488 of the Code of Criminal Procedure 1973 is different, and both provisions can stand together.⁷¹

SUB-SECTION (1): DISCRETION OF THE COURT

The Act vests the court with a wide discretion in the matter of granting maintenance, but the discretion is judicial, and not arbitrary or capricious. It is to be guided on sound principles of law and to be exercised within the ambit of the provisions of the relevant sections, and having regard to the objects of the Act. In determining whether maintenance should be awarded, the court would have regard to all the facts and circumstances of the case, including the respondent's own income and other property, if any; the income and other property of the applicant; the conduct of the parties in the matter of their family relations with one another; and all the factors set out in sub-ss (2) and (3) as are applicable to the case.

SUB-SECTION (2)

The sub-section read with sub-s (1), it will be noticed, leaves the matter of fixation of the amount of maintenance to the discretion of the court while stressing that the position and status of the parties, reasonable want of the claimant, the income and property of the claimant, and the number of persons whom the respondent is bound to maintain, are among the factors and circumstances which must be taken into consideration by the court. It does not seem helpful to refer to the immense range of decisions of courts in India under the previous law on the subject of maintenance and fixation of the amount of maintenance in case of different claimants, though most of the cases relate to maintenance to be awarded to wife and widow. Danger lies in phrases used aptly enough in a particular context and opinions useful in their own sphere being treated as riders to the actual statutory language now employed by the legislature. This sub-section which must be read with sub-s (1) does not purport to lay down any rigid rule or indicate any yardstick upon all cases covered by it, nor does it point to any fixed criterion and leaves the matter of assessment to the discretion of the court, and only emphasised that the considerations mentioned in it are essential

⁷⁰ *Vidyadhara v Dvadevamma* AIR 1974 AP 38.

⁷¹ *Bhagwan Dutt v Kamla Devi* AIR 1975 SC 83.

factors to be considered. The elements and factors to be considered must include everything having a legitimate bearing upon present or prospective matters affecting the family relations and living of the claimant and the respondent, which are obviously not susceptible of proper enumeration. In the exercise of its discretion, the court has to select or emphasise such factors as are appropriate to the facts of the particular case. In a leading case on the subject of fixation of maintenance, the Privy Council pointed out that maintenance depended 'upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families; as a survey of the condition and necessities and rights of the members, on reasonable view of change of circumstances possibly required in the future, regard being of course had to the scale and mode of living and the age, habits and wants and class of life of the parties.'⁷² What is stated above is, in general, applicable to the case of any of the claimants mentioned in this sub-section. In case of a wife, in addition to these factors, the mode of living of the parties in the matter of expenses while cohabitation lasted, may be taken into consideration, though it would not always be a reliable index because the past mode of life may have been on a penurious or miserable scale or on the other hand, on an extravagant scale. However, if the scale was suited to the position and status of the parties, that may be a factor to be considered in the estimate where there is too-reliable a data on the point of income or property. It would be necessary and of primary importance to consider the overall financial position of the respondent in all cases under the sub-section, though curiously enough, the sub-section omits to stress the same while it mentions the financial position and income of the claimant. Anyway, the words 'position and status of the parties' in cl (a) are wide enough to include the financial position of both the parties as a vital consideration in the matter.

In *Kulbhushan v Raj Kumari*,⁷³ the Supreme Court expressed its entire agreement with the observations of the Judicial Committee of the Privy Council quoted above, and stated that this sub-section made no departure from the principles enunciated there, except perhaps to a limited extent envisaged in sub-cl (d) and (e) of the section.

One factor of primary importance in making the reasonable induction required by the court, would obviously be the overall financial position of the respondent which would have to be determined having regard to the 'free estate' and 'free income' of the respondent. In *Kulbhushan v Raj Kumar*, the court regarded income-tax and contributions to provident fund as legitimate deductions in arriving at the 'free income' of the respondent.

⁷² *Ekradeshwari v Homeshwar* (1929) 56 IA 182, 8 Pat 840, 116 IC 409, AIR 1929 PC 128.

⁷³ AIR 1971 SC 234; *Baby Rashmi Mehra v Sunil Mehra* AIR 1991 Del 44. (*Kulbhushan* supra, explained; Income tax returns whether to be accepted).

Ofcourse, the financial position of both the parties must enter in the final assessment of the quantum of maintenance to be allowed by the court.

CLAIMANT LIVING SEPARATELY

A dependant, for instance, a daughter, who has good reasons for living separately (from the father), is entitled to claim maintenance under this section.⁷⁴

CLAIMANT'S OWN EARNINGS

Clause (d) does not speak of the claimant's capacity to earn, but of actual earnings and existence of sources of income.

SUB-SECTION (3)

The sub-section read with sub-s (1), it will be noticed, leaves the matter of fixation of the amount of maintenance to be awarded to any dependant of a deceased male or female Hindu to the discretion of the court while stressing that the amount of free estate, the benefit, if any, that the dependant might have already taken under a will of the deceased, the closeness of relationship between the two, the past relations between the claimant and the deceased, the reasonable wants of the claimant, the financial position and income of the claimant and the number of other dependants entitled to claim maintenance from the estate, are among the factors and circumstances which must be taken into consideration by the court. This sub-section which must be read with sub-s (1), does not purport to lay down any rigid rule or indicate any yardstick for all cases covered by it, nor does it point to any fixed criterion and leaves the matter of assessment to the discretion of the court, and only emphasises that the considerations mentioned in it are essential factors to which regard must always be had. The elements and factors to be considered must include the conduct of the claimant and everything having legitimate bearing on present or prospective matters affecting the claimant, as well as the estate, which are obviously not susceptible of proper enumeration. In the exercise of its discretion, the court must have regard, among others, to the prime factors mentioned above and select or emphasise such of the factors and circumstances as are appropriate to the facts of the particular case. It is out of numerous circumstances, all of which cannot be listed, many of them small in themselves; the assessment of what is just and reasonable maintenance for the particular dependant, has to be arrived at by the court.

⁷⁴ *Laxmi v Krishna* AIR 1968 Mys 288.

ARREARS OF MAINTENANCE

The principal on which the court exercises its discretion in the matter of fixation of quantum of arrears of maintenance, particularly when the claim is for an unduly long period, is well-settled. In such cases, the court, in the exercise of its discretion, generally awards arrears of maintenance at a lesser rate than that fixed at the normal rate and at times, at a rate which is half of that of the normal rate (*Laxmi v Krishna supra*).

24. Claimant to maintenance should be a Hindu.—No person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion.

CLAIMANT TO MAINTENANCE SHOULD BE A HINDU

The legislature has inserted in this section a general provision to the effect that the person claiming maintenance under any section of the Act (chapter III) must be a Hindu. This also follows from s 2 of the Act, which states that the Act applies to Hindus in the whole connotation given to that expression. It is a necessary corollary to the rule laid down in this section that if a person who is awarded maintenance under any provision of the Act, by a decree of the court or by agreement of the parties, forfeits the right to claim future maintenance from the date of his or her ceasing to be a Hindu by conversion to any religion other than Hinduism, Jainism, Buddhism or Sikhism, and the decree or agreement becomes unenforceable. If necessary, the court will in any such case, rescind any previous order for maintenance that may have been made by it.

Where a Hindu daughter is converted to another religion, pending adjudication of her claim against her father for past and future maintenance, she would be entitled to recover maintenance till the date of conversion, though not to future maintenance.⁷⁵

25. Amount of maintenance may be altered on change of circumstances.—The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstance justifying such alteration.

⁷⁵ *Surendrabal v Suppiah* AIR 1963 Mad 260.

VARIATION OF ORDER OR AGREEMENT FIXING MAINTENANCE

The section, it is submitted, confers ample powers on the court to vary, modify or even discharge any order fixing the amount of maintenance made by a decree of the court, even though it only states that the amount of maintenance may be 'altered' subsequently, if there is material change in the circumstances justifying such action. There must be some material change in circumstances justifying the alteration. It would seem that the circumstances justifying alteration would principally be changes in the pecuniary circumstances of the parties. This section does not speak of the conduct of the parties, but it would seem that the subsequent conduct of the parties may in a given case become a relevant consideration for the court in determining whether there has been a material change in the circumstances justifying such alteration. The expression 'circumstances' would be given wide and extensive meaning.

It may now be taken as settled law that a decree or agreement fixing maintenance in favour of a wife or widow or other claimant is no bar to a claim for increased maintenance under this section if the circumstances justify such alteration, and it is immaterial whether the decree or agreement was in place before or after this Act. The claimant would be entitled to increased maintenance if there is a material change in the circumstances, notwithstanding the fact that the claimant had agreed not to claim higher maintenance even in changed circumstances.⁷⁶ The right conferred under this section supersedes any contract to the contrary. The fact that the rate of maintenance was fixed by a compromise decree makes no difference. The same is the position with regard to a family settlement.⁷⁷ However, where the right of maintenance had become extinguished by agreement between the parties before the coming into force of the Act, this section would not apply, and there can be no question of any enhancement of the amount of maintenance.⁷⁸

Alteration in the amount of maintenance fixed by a decree cannot be obtained merely by making an application to the court, unless there is provision in the decree granting liberty to apply to have such variation made by way of an application. Otherwise, the only way in which the

⁷⁶ *Kameshwaramma v Subramanayam* AIR 1959 AP 269; *Muniammal v Raja* AIR 1978 Mad 103 and cases there cited; *Indira Bai v BA Patel* AIR 1974 AP 303 (abnormal cost of living); *Gopala Rao v Sitharamamma* AIR 1965 SC 1970, 1973-174; *Ambayamma v Ganapathi* AIR 1969 AP 213 and cases there cited; *Binda Prasad Singh v Mundrika Devi* AIR 1968 AP 196; *Veeramma v Seethamma* AIR 1969 AP 15 (there was surrender of estate by widow in favour of reversioners who agreed to give her maintenance and the widow agreed not to claim enhanced maintenance in the future. It was held that the agreement was binding on her).

⁷⁷ *Seshi Ammal v Tharyu Ammal* AIR 1964 Mad 217; *Rangamma v Venkatarajulu* AIR 1966 Mad 428 (family settlement).

⁷⁸ *Kondamma v Scthamma* AIR 1973 AP 319 (FB).

variation can be sought would be by way of suit.⁷⁹ A party obtaining any such decree should take care to reserve liberty to apply.

26. Debts to have priority.—Subject to the provisions contained in section 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act.

**DEBT PAYABLE BY ESTATE OF DECEASED TO HAVE
PRIORITY OVER CLAIM FOR MAINTENANCE
UNLESS THERE IS A CHARGE CREATED IN RESPECT
OF THE SAME**

Debt contracted or payable by a deceased Hindu takes precedence over the right of maintenance of any of his dependants mentioned in s 21 of the Act, unless there is a valid charge created in respect of the same (s 27). The section, it will be noticed, deals with the question of priority as between the claims of dependants of a deceased Hindu for maintenance, and those of the creditors of the deceased. The position is the same even as regards the claim for maintenance of the wife, daughter-in-law, minor children or aged parents of a Hindu in cases falling under ss 18–20, unless the claim has been secured by a valid charge. Reference may be made to §§ 569–72 (Vol I).

27. Maintenance when to be a charge.—A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.

MAINTENANCE WHEN TO BE A CHARGE

The section reiterates the rule established by a long series of decision under the law as previously applied—that the claim even of a widow for maintenance is not a charge upon the estate of her deceased husband—whether joint or separate, until it is fixed and charged upon the estate. This may be done by a decree of the court,⁸⁰ or by the will of the deceased,

⁷⁹ *Menokabala v Panchanan* AIR 1966 Cal 228; *Binda Prasad v Mundrika Devi* supra.

⁸⁰ *Bhago v Bachni* AIR 1972 P&H 169 (a charge may also be the decree of the court, but court cannot direct possession of property to be given in lieu of maintenance).

or by agreement between the widow and the holder of the estate or any portion of the estate or otherwise. Therefore, the right of maintenance of any claimant is liable to be defeated by a transfer of the property to a bona fide purchaser for value without notice of any such claim for maintenance. Infact, any such right for maintenance, for instance, of a widow or a minor son, is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which, no charge exists.

It is only equitable that when a court creates a charge for maintenance in favour of a claimant, it should not do so over properties far out of proportion to the quantum of maintenance decreed in favour of the claimant.⁸¹

This section may be read with s 28, which deals with the effect of transfer of property on right to maintenance.

28. Effect of transfer of property on right to maintenance.—Where a dependant has a right to receive maintenance out of an estate, and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right.

EFFECT OF TRANSFER OF PROPERTY ON RIGHT TO MAINTENANCE

The section may be read with s 27 above. It reiterates the rule established by a long series of decisions under the law as previously applied that the right of maintenance of any dependant, for instance a widow, not being a charge, it is equitable that it should not be enforced against a transferee for value without notice of the right. A transferee for value may be a purchaser, or he may be a mortgagee. The provisions of s 39 of the Transfer of Property Act 1882, are to the same effect:

Where a third person has right to receive maintenance, or a provision for advancement or marriage from the profits of immovable property, and such property is transferred... the right may be enforced against the transferee, if he has notice thereof or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hands.

Reference may be made to §§ 569–72 (see Vol I).

81 *Ramaswamy v Baghyammal* AIR 1967 Mad 457.

There is no reason why the words 'right to receive maintenance' in the section should not include a right to claim enhanced maintenance.⁸²

The provisions of the Act may not apply to the case of enforcement of a claim against a joint family; but the Act apart, a widow can claim enhanced maintenance and enforce her right under a decree for maintenance, in altered circumstances, against an alienee for consideration with notice of the charge created by the decree.

The section is not exhaustive, and a Hindu wife is still entitled to rely on s 39 of the Transfer of Property Act 1882, which is not abrogated by the present section; and it is open to the court to create a charge in her favour over the property of the husband as against an alienee of the same who has purchased the same with notice of such right.⁸³

It is competent to the court in the exercise of its discretion to create a charge in favour of a wife in respect of maintenance, although it is not mentioned in s 21 as a dependant. Claim of maintenance of illegitimate children can be enforced under this section.⁸⁴ A claim for maintenance on such property can enure only when the transferee has notice of such subsisting right. In absence thereof, without a charge being created, a claim on property is not tenable.⁸⁵

The right to maintenance cannot, of course, be defeated by gratuitous transfer.⁸⁶

The expression 'such estate' must mean only such estate out of which the claimant had a right to receive maintenance, and cannot include any other property out of which the claimant had no right to claim maintenance.⁸⁷

CHAPTER IV

REPEALS AND SAVINGS

29. Repeals.—[Rep. by the Repealing and Amending Act, 1960 (58 of 1960), Sec. 2 and Sch. I.]

30. Savings.—Nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

82 *Kaveri Amma v Parameswari Amma* AIR 1971 Ker 216.

83 *Ramaswamy v Baghyammal* AIR 1967 Mad 457; *Raghawan v Nagammal* AIR 1979 Mad 200.

84 *Krishnakumari v Vanalakshmi* AIR 1976 AP 365.

85 *Kangal v Atwariya Devi* AIR 2002 All 77.

86 *Ramappa v Gouruwa* AIR 1968 Mys 270; *Kapur Kaur v Kishan Singh* AIR 1970 P&H 270.

87 *Parul Bala v Bangshdar* AIR 1971 Cal 270.

SAVING

The Act as expressly ruled in s 4, inter alia, supersedes the law relating to adoptions as previously applicable to Hindus. However, it is not intended to have retroactive operation by affecting the validity, and effect of any adoption made in accordance with the law before the Act came into operation. It is a firmly established principle of interpretation that except as to matters of procedure, a statute is not to be given retrospective effect so as to impair or disturb any existing rights or obligations, unless it says so in express terms, or unless such intendment has to be gathered from necessary implication of the language used. Moreover, s 5 of the Act expressly lays down that (only) adoptions made after commencement of the Act are to be regulated by the provisions of this Act. Savings are sometimes inserted by the legislature *ex majore cautela*, as for instance, by the present section which in terms states that nothing contained in the Act is to affect any adoption made before its commencement, and that the validity and effect of any adoption is to be determined in accordance with the previous law.

The Supreme Court in *Daneraiji v Chandraprabha* has held by a majority that the second part of the section merely clarifies what is embodied in the first part, and that the first part does not go beyond saving merely the validity and effect of an adoption made before the commencement of the Act.⁸⁸

⁸⁸ *Danrajji v Vahaji Maharaj Chandraprabha* AIR 1975 SC 784, also see notes under ss 4 and 15 where reference is made to this decision.

APPENDIX I

THE HINDU DISPOSITION OF PROPERTY ACT 1916



ACT NO XV OF 1916

[Received the assent of the Governor-General on 28 September 1916]

An Act to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition.

WHEREAS it is expedient to remove certain existing disabilities in respect of the power of disposition of property by Hindus for the benefit of persons not in existence at the date of such disposition. It is hereby enacted as follows:

1. Short title and extent.—(1) This Act may be called the Hindu Disposition of Property Act, 1916.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Dispositions for the benefit of persons not in existence.—Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer *inter vivos* or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition.

3. Limitations and conditions.—The limitations and provisions referred to in section 2 shall be the following, namely:

(a) in respect dispositions by transfer *inter vivos* those contained in chapter II¹ of the Transfer of Property Act, 1882; and

¹ 'Chapter II' was substituted for 's 13, 14 and 20', by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, s 12 which came into force on 1 April 1930.

(b) in respect of dispositions by will those contained in sections 113, 114, 115 and 116 of the India Succession Act, 1925.²

4. [Omitted by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, section 12.]³

5. Application of this Act to the Khoja community.—Where the State Government is of opinion that the Khoja community in the State or any part thereof desire that the provisions of this Act should be extended to such community, it may, by notification in the Official Gazette, declare that the provisions of this Act, with the substitution of the word 'Khojas' or 'Khoja' as the case may be, for the word 'Hindus' or 'Hindu' where ever those words occur, shall apply to the community in such area as may be specified in the notification, and this shall thereupon have effect accordingly.

Note—The Act in the unamended form still applies to transactions before April 1930. (Vide s 15 of Act XXI of 1929).

2 The words and figures 'ss 113, 114, 115 and 116 of the Indian Succession Act 1925', were substituted for the words and figures 'ss 100 and 101 of the Indian Succession Act 1865', by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, s 12.

3 The original s 4 was as follows: Failure of Prior disposition Where a disposition of property fails by reason of any of the limitations referred to in s 3, any disposition intended to take effect after or upon failure of such prior disposition, also fails.

APPENDIX II

THE HINDU INHERITANCE (REMOVAL OF DISABILITIES) ACT 1928



ACT NO XII OF 1928

[Received the assent of the Governor-General on 20 September 1928]

An Act to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts.

WHEREAS it is expedient to amend the Hindu law relating to exclusion from inheritance of certain class, and to remove certain doubts. It is hereby enacted as follows:

1. Short title, extent and commencement.—(1) This Act may be called the Hindu Inheritance (Removal of Disabilities) Act, 1928.

(2) It extends to the whole of India, except the State of Jammu and Kashmir.

(3) It shall not apply to any person governed by the Dayabhaga School of Hindu law.

2. Persons not to be excluded from inheritance or rights in joint-family property.—Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, other than a person who is and has been *from birth a lunatic or idiot*, shall be excluded¹ from any right or share in joint-family property by reason only of disease, deformity or physical or mental defect.

3. Saving and exception.—Nothing contained in this Act shall affect any right which has accrued or any liability which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of any religious office or service or of *the* management of any religious or charitable trust which he would not have had if this Act had not been passed.

¹ The words 'from inheritance or' omitted *ibid*.

Section not retrospective.—If any person suffering from any *physical* defect has before passing of the Act (20 September 1928) been already excluded from inheritance or from a share on partition, the Act does not entitle him to claim the inheritance or the share on partition.

APPENDIX III

THE CHILD MARRIAGE RESTRAINT ACT 1929



ACT NO XIX OF 1929

[Received the assent of the Governor-General on 1 October 1929]

An Act to Restrain the Solemnisation of Child Marriages

WHEREAS it is expedient to restrain the solemnisation of child marriages. It is hereby enacted as follows:—

1. Short title, extent and commencement.—(1) This Act may be called the Child Marriage Restraint Act, 1928.

(2) It extends to the whole of India except the State of Jammu and Kashmir and it applies also to all citizens of India without and beyond India.

(3) It shall come into force on the 1st day of April, 1930.

2. Definition.—In this Act, unless there is anything repugnant in the subject or context—

- (a) 'child' means a person who if a male, is under eighteen years of age, and if a female, is under fifteen years of age;
- (b) 'child marriage' means a marriage to which either of the contracting parties is a child;
- (c) 'contracting party' to marriage to which either of the parties whose marriage is or is about to be thereby solemnised; and
- (d) 'minor' means a person of either sex who is under eighteen years of age.

3. Punishment for male adult below twenty-one years of age marrying a child.—Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with simple imprisonment which may extend to fifteen days or with fine which may extend to one thousand rupees or with both.

4. Punishment for male adult above twenty-one years of age marrying a child.—Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine.

5. Punishment for solemnising a child marriage.—Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine, unless he proves that he has reason to believe that the marriage was not a child marriage.

6. Punishment for parent or guardian concerned in a child marriage.—(1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to three months, and shall also be liable to fine.

Provided that no woman shall be punishable with imprisonment.¹

(2) For the purpose of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

7 [Omitted by Act XLI of 1949.]

8 ...

9 ...

10 ...

11 [Omitted by Act XLI of 1949.]

12. Power to issue injunction prohibiting marriage in contravention of this Act.—(1) Notwithstanding anything to the contrary contained in this Act, the court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be against any person unless the court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

¹ *Ram Jash Agrawala v Chand Mandal* (1937) 2 Cal 764. *Public Prosecutor v Rattavva* (1937) Mad 854, 168 IC 723. 1937 Mad 990. *Emperor v Munshi Ram* (1936) 58 All 402, 159 IC 1007.

(3) The court may either on its motion or on the application of any person aggrieved, rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term, which may extend to three months, or with fine which may extend to one thousand rupees, or both:

Provided that no woman shall be punishable with imprisonment.

APPENDIX V

*THE HINDU WOMEN'S RIGHTS TO PROPERTY ACT 1937



ACT NO 18 OF 1937

[Received the assent of the Governor-General on 14 April 1937]

NOTE: The provisions of the Act are set out under § 35.

APPENDIX VI

THE BENAMI TRANSACTIONS (PROHIBITION) ACT 1988



ACT NO 45 OF 1988

[5 September 1988]

An Act to prohibit benami transactions and the right to recover property held benami for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Thirty-ninth Year of the Republic of India as follows:

1. Short title, extent commencement.—(1) This Act may be called the *Benami Transactions (Prohibition) Act 1988*.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) The provisions of sections 3, 5, and 8 shall come into force, and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of May, 1988.

2. Definitions.—In this Act, unless the context otherwise requires—

- (a) ‘*benami* transaction’ means any transaction in which property is transferred to one person for a consideration paid or provided by another person.
- (b) ‘prescribed’ means prescribed by rules made under this Act.
- (c) ‘property’ means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

3. Prohibition of *benami* transactions.—(1) No person shall enter into any *benami* transaction.

(2) Nothing in sub-section (1) shall apply to the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property

- (xii) the widow of son of his predeceased son (so long as she does not remarry);
- (xiii) his or her illegitimate minor son;
- (xiv) his or her illegitimate daughter (so long she remains unmarried).

It will be noticed that a larger number of persons are included among the dependants of a male Hindu.

In case of the grandson, the right to claim maintenance as a dependant, and the extent of such right is conditional upon his being unable to obtain maintenance from his father's or mother's estate. In case of the great-grandson, the right to claim maintenance as a dependant and the extent of such right is conditional upon his being unable to obtain maintenance from the estate of his father or mother or father's father or father's mother. In case of a grand-daughter, the right to claim maintenance and the extent of such right is conditional upon her being unable to obtain maintenance as a dependant from the estate of her father or mother. In case of a great-grand-daughter, the right to claim maintenance as a dependant and the extent of such a right is conditional upon her being unable to obtain maintenance from the estate of her father or mother or father's father or father's mother. In case of the widowed daughter, the right to claim maintenance as a dependant and the extent of such right is conditional upon her being unable to obtain maintenance from the estate of her husband; her son or daughter; or the estate of her son or daughter; or from her father-in-law, or his father or the estate of either of them. In case of the widow of his son, the right to claim maintenance as a dependant and extent the such right is conditional upon her being unable to obtain maintenance on the estate of her husband; or from her son or daughter; or the estate of her son or daughter. In case of the widow of the son of his predeceased son, the right to claim maintenance as a dependant and the extent of such right is conditional upon her being unable to obtain maintenance from the estate of her husband; or from her son or daughter; or the estate of her son or daughter, or the estate of her father-in-law. As to stepson and stepmother, see the undermentioned decision.⁶⁶ A destitute widowed daughter has a right of maintenance against her brother in absence of her in-laws capacity to maintain her.⁶⁷

WIDOW: REMARRIAGE

A widow would forfeit her right to maintenance on her remarriage as clearly laid down in s 22 read with s 21(iii) of the Act; but, these provisions cannot effect any gift of immovable property made by a husband in favour of his wife to be enjoyed by her after his death in lieu of maintenance without any power of alienation. Such a grant would remain operative despite remarriage or unchastity forfeiting her rights.⁶⁸

⁶⁶ *Panna Lal v Fulemoni* AIR 1987 Cal 368.

⁶⁷ *Kota Varaprasad Rao v Kota China Venkaiah* AIR 1992 AP 1 (case law discussed)

⁶⁸ *Sankrerihala v Asita Barani* AIR 1977 Cal 289

WIDOW OF A DECEASED COPARCENER

Sections 21 and 22 are not intended to affect the general rule of Hindu law that the widow of a deceased coparcener is entitled to maintenance out of the coparcenary property held by the surviving coparceners.⁶⁹

UNMARRIED DAUGHTER

Maintenance in case of an unmarried daughter—which could include marriage expenses,⁷⁰—is a matter for which provision has been made in the Act and would be worked out under the provisions of the Act. An unmarried daughter who gets a share in her father's estate would not be further entitled for a provision for her marriage expenses in a suit for partition.⁷¹

SISTER

A sister is not included in the list of dependants in s 21, but that does not in any way abridge her pre-existing right to claim maintenance from her brother who inherited the father's property. Her right has not been obliterated.⁷²

ILLEGITIMATE SON OF A SUDRA

Under *Mitakshara* law, prior to this Act, the illegitimate son of a *sudra* had the right to claim maintenance as stated in § 551 (Vol I). Any such right, which vested in him, prior to his Act is not estopped by these two sections. He is entitled to maintenance for life and not only during his minority, as would now be the case under s 21(viii) and s 22.⁷³

AVARUDDHA STRI

These two sections are prospective and not retrospective in their operation, and they do not destroy the right of an *avaruddha stri* to claim maintenance which had vested in her before the commencement of this Act, although she is not included in the list of dependants. (For *avaruddha stri* see § 553 (vol I).)

69 *Govardhan v Gangabai* AIR 1964 MP 168.

70 See definition in s 3(b).

71 *Karuppena v Chinna Nachammal* AIR 1974 Mad 329.

72 *Ramabai v Narayana Rao* AIR 1967 MP 86.

73 *Gopala Rao v Sitharamamma* AIR 1965 SC 1970.

had been purchased for the benefit of the wife or the married daughter.

(3) Whoever enters into any *benami* transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.

4. Prohibition of the right to recover property held *benami*.—

(1) No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held *benami*, whether against the person, in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply—

- (a) Where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or
- (b) Where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.

5. Property held *benami* liable to acquisition.—(1) All properties held *benami* shall be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribe.

(2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).

6. Act not to apply in certain cases.— Nothing in this Act shall effect the provisions of section 53 of the Transfer of Property Act, 1882 (4 of 1882), or any law relating to transfer for an illegal purpose.

7. Repeal of provisions of certain Acts.— (1) Sections 81, 82 and 94 of the Indian Trust Act, 1882 (2 of 1882), section 66 of the Code of Civil Procedure, 1908 (5 of 1908), and section 281-A of Income-Tax Act, 1961 (43 of 1961), are hereby replaced.

(2) For the removal of doubts, it is hereby declared that nothing in sub section (1) shall affect the continued operation of section 281-A of Income Tax Act, 1961 (43 of 1961) in the State of Jammu and Kashmir.

8. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of following matters, namely:

- (a) the authority competent to acquire properties under section 5;
- (b) the manner in which, and the procedure to be followed for, and the acquisition of properties under section 5;
- (c) any other matter which is required to be, or may be, prescribed.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule, shall thereafter have effect only in such modified form or be of no effect, as the case may be: so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

9. Repeal and saving.—(1) The *Benami* Transaction 'Prohibition of the Right to Recover Property' Ordinance 1988 (Ordinance 2 of 1988), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

INDEX



A

Adoption, 71, 259, 266, 335–37, 511–96
by widow, 536–37, 551–52
capacity of female to adopt son
as well as daughter, 515
capacity of female to take in, 536
capacity of mate to adopt son
as well as daughter, 515
capacity of male to take in, 533–35
ceremonies incidental to, 547
consent, free, 549
dependents, maintenance of,
512(*see also* Dependents)
daughter (*see* Daughter; Heirs)
determination of adoptive mother
in certain cases, 568–61
father, age of adoptive, 348, 547
father, mother, court may give
son or daughter in, 539–41
father, power vests only in, 549
Hindu Adoptions and Maintenance
Act 1956, (*see also* Maintenance),
60, 62, 91, 134–35, 156, 232, 233,
240, 247, 248, 251–52, 259, 266,
288, 336, 337, 338, 339, 344, 345,
346, 347, 349, 350, 412, 413, 418,
470, 491, 524
Hindu Adoptions and Maintenance
Act 1959, (*see, also* Maintenance),
37, 523–96
application, 512–13, 525–26
codification, 523–24
custom, usage, 527
definitions, 526–27
effect, 527–30
inter-country, 532–33
maintenance, scheme of,
518–19

minor, 527
mother, 529–40 (*see also*
Heirs; Mother)
age of adoptive, 547
power vests only in, 549
must be actually given and
taken, 548
not retrospective in its
operation, 529–30
of daughter can be only
who has no daughter,
546–47
of religious order, 71
of son can be only by who
has no son, 545–46
persons capable of giving
in, 538–41
persons governed by, 526
persons who may be
adopted, 516, 541–44
power vests only in father
and mother, 549
presumption as to registered
documents relating to,
561–63
prohibition of certain
payments, 563–64
relative (relationship) by,
298, 335–37, 411–21
religious order, 146–47
requisite formality: giving
and taking, 516–17
result and effects, 517–18,
549–57
right of adoptive parents to
dispose off their properties,
557–58
rules, 518, 522

- sanction of court, 540-41
 scheme, 514-15
 simultaneous, 547
 taking in, 533-35
 to be regulated, 530-31
 valid (validity)
 conditions for, 513-14,
 515, 544-49
 consequences of void,
 531
 not to be cancelled, 561
 requirements of, 513-14,
 532
 widow, by, 536-37, 551-52
 wife, consent of, 534-35
 who can give, in, 516
- Adultery, 9, 13, 70, 92, 97-103, 128,
 133-34, 203, 214, 225, 263
 based on non-access and long
 period of gestation of child
 born to wife, 99-100
 blood-test, 89, 100
 condonation of, 103
 confession or admissions of,
 100-02
 corroboration in case of, 203-06
 ground for 'judicial separation,
 102
 onus and standard of proof,
 102-03
- Age (*see also* Bride)
 as mental capacity, 6, 48
 father, age of adoptive, 547
 mother, age of adoptive, 547
 of bride, 48, 50-51
 of bridegroom, 48-49
 of parties: consent, 48-49
- Agnates (*see also* Succession), 295,
 297, 353-55
 definition, 365-76
 order of succession among, 355,
 365
- Agriculture
 Agricultural
 holdings, 302
 land, 302
 Punjab agricultural customs, 300
- Alimony *pendente lite*, 12, 192, 236,
 238
- Aliyasantana* Law, 283, 284, 291, 295,
 297, 300, 305, 325, 326, 327, 328,
 335, 408, 427, 432, 433, 469
 Aliyasantana Act 1949, 328,
 468-69
 Madras Aliyasantana Act 1949,
 329, 469
 Madras Aliyasantana (Mysore
 Amendment) Act 1 of 1962,
 328
- Ancestors, 28, 29, 296
- Andhra Pradesh Amendment
 (AP Act 13 of 1986) 1985, 461
- Andhra Pradesh (Andhra area)
 Hereditary Village Offices Act
 1895, 301
- Animus deserendi, 123-40
- Apastamba, 1
- Appeals, 192-93, 242, 263-64
 forum of, 272-73
 form decrees and orders,
 269-75
 pending, 235-36
 second, 264
 under letters patent, 272
- Appellate Court (*see also* Court)
 interference by, 274-75
- Arya Samaj, 24, 293,
 Arya Samajists, 4, 25, 294
- B**
- Benami (*see* Property)
- Bestiality, husband guilt of, 10, 71,
 91, 155
- Bigamy, 7, 8, 12, 47, 73
 bigamous marriages (*see*
 Marriage)
- Bombay Prevention of Hindu
 Bigamous Marriages Act 1946,
 279
- Madras Hindu (Bigamy
 Prevention and Divorce) Act
 1949, 279
 punishment of, 179
 injunction, 181
 trial, venue of, 181
- Blood relation (*see* Relationship)
- Blood-test, 89, 100

- Bombay Hindu Divorce Act 1946
(22 of 1047) (*see also* Divorce), 13,
155, 279
- Bombay Prevention of Hindu
Bigamous Marriages Act 1946 (*see
also* Marriage), 279
- Brahminism, 25
- Bride (*see also* Age)
 natural guardian of, 50–51
 consent of guardian of minor,
 50
- Buddhism, 283, 591
- Buddhists, 4, 12, 24, 25, 44, 141, 283,
293, 294, 481, 512, 525, 543
- C**
- Castes, 12, 43–44
 Caste Disabilities Removal Act
 1850, 343, 459
 division of Hindu castes, 12
- Children, (Child), 25–28, 309, 548,
601–02
 adopted, 37
 custody of, 264–66
 proceedings, 265
 illegitimate, 25, 27, 37, 38, 265, 294,
 298, 339, 345, 351, 578–80
 in womb, right of, 443–44
 legitimate, 18, 26, 37, 38, 73–74,
 75, 173–79, 265, 294, 298, 348,
 351, 578–80
 of void and voidable
 marriages, 173–79
 maintenance of, 520, 578–81
 marriage, 6, 601–03
 Child Marriage Restraint
 (Amendment) Act 1978,
 43, 50–52, 62, 76, 77, 87
 Child Marriage Restraint Act
 1928, 601
 Child Marriage Restraint Act
 1929, 182, 601–03
 power to issue injunction
 prohibiting marriage in
 contravention of, 602–03
 punishment for male adult
 above twenty-one years of
 age marrying child, 602
 punishment for male adult
 below twenty-one years of
 age marrying child, 601
 punishment for parent or
 guardian concerned in
 child marriage, 602
 punishment for solemnising,
 602
 minor, 484–90
- Christianity (Christians), 4, 26, 46, 140,
283, 29
 in Pondicherry, 295
- Citizenship, 24
- Civil Court (*see* Court)
- Civil Marriage (*see* Marriage)
- Civil Procedure Code (Code of Civil
Procedure), 30, 67, 157, 188,
189–96, 197, 229, 240, 242, 270, 271,
272
 declaratory suit under, 74
 procedure regulated by, 5, 189–90
- Cochin
 Cochin Marumakkothsyam Act
 (XXXIII of 1113), 296
 Cochin Nambudri Act (XVII of
 1113), 296
 Cochin Nayar (Nair) Act (XXXIX
 of 1113), 278, 296
- Cognates (*see also* Succession), 295, 297,
355–57, 365–76
 order of succession among, 356,
 365
- Cohabitation
 for one year or more after
 decree of judicial separation,
 148–50
 resumption of, 256
- Computation
 of interest of deceased
 coparcener, 319–20
 of share, 347, 349, 350, 353
- Condonation, 103, 122, 139–40,
214–17, 218–19, 221
- Conjugal rights, 7, 15, 59–71, 91, 278
 restitution of, 59–71, 91, 150–54
 burden of proof, 631
 correspondence between
 spouses, 65

- decree, consent, 67
- decree for, basis of rule
 - and, importance, 60-61
- decree, mode of execution of, 67
- decreed, when, 61-63
- delay in instituting proceedings, 66
- excuse, 63-65
- just excuse, 63-65
- mutual consent, 66-67
- petition to, 61
- proceedings, pending, 67-68
- reasonable excuse, 63-65
- refused, when, 61-63
- separation by mutual consent, 66-71
- Connivance, anticipatory willing consent, 212-14
- Consent of parties
 - by force or fraud, 85-87
 - connivance, anticipatory willing, 212-14
 - decree, 67, 72, 150, 154
 - mutual, 66-67
 - no decree merely by, 206-08
- Consummation (consummate marriage), 79-83 (*see also* Marriage)
 - wilful refusal of respondent to, 82-83
- Conversion, 27, 90, 92, 140-41, 458-59, 573-74
 - convert's descendants disqualified, 458-59
 - converts or reconverts, 4, 27
 - Native Convert's Marriage Dissolution Act 1866, 140
 - unchaste wife converted to another religion, 575
 - wife ceased to be Hindu by, 573-74
- Coparcenary (Coparceners), 287-90, 308-24 (*see also* Mitakshara)
 - debts of deceased, 321-22
 - deceased, 310-22
 - computation of interest of, 319-20
 - debts of, 321-22
 - joint family business continued after death of, 322
 - partition between, 310-21, 324-25, 329-30, 333-34, 338, 340-42, 461-62
 - property, 312, 313, 333-34, 340-42, 461-62
 - surviving, 312, 320-21
- Co-respondent, 193-94
 - granting of damages against, 194
- Corroboration (Corroborative evidence), 122, 203-06
- Court, 497-98, 540-41
 - Appellate Court, interference by, 274-75
 - Civil Court, 30, 406, 492
 - Civil Courts Act, 187
 - discretion, 208-09, 238-40
 - District Court, 30, 182-87, 267, 492
 - jurisdiction, 182-87
 - petition to, 61, 182-87
 - duty of, 13-14, 202-03
 - inherent powers of, 191
 - jurisdiction, 182-87, 232-33, 249
 - power to allow intervention, 193-94, 274-75
 - powers, 191, 193-94, 202-03
- Criminal Procedure Code (Code of Criminal Procedure), 103, 181, 185, 233-34, 256, 575, 579, 588
- Cruelty, 9, 90, 104-40, 214, 221, 568-69
 - clause (1A) of Hindu Marriage Act 1955, 113-20
 - corroboration, 122
 - desertion and, 138 (*see also* Desertion)
 - dowry (*see* Dowry)
 - evidence, 12
 - intention to injure actual, 112-13
 - legal, 110-12
 - mental, 109-10
 - principles, 110-12
 - proof, 122
 - sexual malpractices, 116-17
- Custom or usage, 28, 29-30, 297, 527

D

- Damages granting of, against co-respondent, 194
- Daughter (*see also* Adoption; Heirs)
- adopted, 413
 - adopted, natural guardianship of, 491
 - equal rights to in coparcenary property, 308–10
 - father, mother, court may give in adoption, 538–40
 - of predeceased daughter, 414
 - son of, 311–19
 - step-daughter, 413
- Dayabhaga (school, system), 31, 281, 282, 283, 285, 288, 312, 343, 469, 470, 520, 522, 576
- Dayavibhaga, 281
- Death, presumption of (rule of presumption), 147–56
- in cases of simultaneous, 444–46
 - person not heard for period of seven years or more, 71, 147–56
- Decrees
- appeals from, 269–75
 - at time of passing of, 249–53
 - computation of, 365–76
 - consent, 67, 72, 150, 154
 - enforcement of orders and, 275
 - mode of execution, 67
 - no decree merely by consent of parties, 206–07
 - of prohibited relationship, 28–38
 - prohibited degrees of marriage, 28–29, 38–39
 - rescission of, 72
 - rules of preference, 365–76
 - succession among agnates and cognates, 365–76
- Defence (s)
- false, 207–08
 - to suit and jurisdiction, 232–33
- Delhi Land Reforms Act, 303
- Dependants, 575–86
- avaruddha stri*, 585
 - daughter, unmarried, 585
 - definition, 581–82
 - illegitimate son of sudra, 585
 - maintenance of, 512, 582–84, 586–87
 - maintenance of deceased, 520
 - persons entitled to maintenance as, 520–21
 - sister, 585
 - widow, 584–85
 - widow of deceased coparcener, 585
 - widowed daughter of deceased, 582
- Desertion, 9, 13, 71, 123–40, 223, 226, 567–69
- constructive, 130–33
 - continuing offence, 128–29
 - cruelty and, 138–39
 - delay, 140
 - delay and proceeding on ground of, 223–26
 - doctrine of condonation and, 139–40
 - mutual, 133
 - offer of reconciliation, 136–38
 - onus and standard of proof, 138–39
 - termination of, 135–36
 - wilful neglect, 130
- Disabilities
- Caste Disabilities Removal Act 1850, 459
 - Hindu Inheritance (Removal of Disabilities) Act 1928, 340, 460
- Diseases (*see also* Mental; Physical; Unsoundmind)
- epilepsy, 43, 48
 - general, 71, 90, 92, 117–18, 141–46
 - leprosy, 71, 90, 92, 145, 569
 - schizophrenia, 1212–22
 - venereal, 9, 71, 90, 117, 145–46
- District Court (*see* Court)
- Divorce (*see also* Separation), 3, 9–11, 72–182
- alternative relief in proceedings, 94, 159
 - Bombay Hindu Divorce Act 1947 (Act XXII of 1947), 18, 155, 279
 - by mutual consent, 10, 160–64

- have been living separately, 162
 - lawful compromise may be recorded, 163
 - not been able to live together, 162
 - petition by both parties together, 161-62
 - subject to provisions of Act, 163-64
 - central legislation, 3
 - decree of, 9-10, 49, 89, 90-92, 97, 120, 153-54
 - decree for judicial separation instead of, 10
 - distinction between judicial separation and, 10-11
 - divorced persons, when may marry again, 169-73
 - deleted proviso, 171-72
 - remarriage before disposal of appeal against decree for dissolution of marriage, 171
 - remarriage before disposal of appeal against decree of nullity, 172-73
 - ex parte decree, 157-58
 - grounds for, 93-64
 - Indian Divorce Act (Divorce Act) (1869), 56, 82, 97, 102, 171, 186, 189, 193, 223, 236, 274
 - judicial separation, 10-11, 59-72, 159
 - conjugal rights and, 59-72
 - locus poenitentiae*, 11
 - Madras Hindu (Bigamy Prevention and Divorce) Act 1949, 279
 - mensa et thoro*, 10, 257
 - mutual consent, 10
 - nullity of, 5, 7-10, 15, 72-182
 - pending petitions, 94
 - petition: no petition within one year of marriage, 164-69
 - contested application for leave, 168-69
 - court may allow, 166-67
 - discretion of court, 169
 - exceptional hardship or exceptional depravity, 167-68
 - proviso, 166
 - petition on for, 169
 - petition to be presented before one year, court may allow, 166-67
 - proceedings, 94
 - Rau Committee, 3, 299
 - recognition to divorce decrees of foreign courts, 156-57
 - registration of, 5
 - relief for respondent in, and proceedings, 229
 - reliefs by way of, 11
 - rules for, uniform, 3
 - Saurashtra Hindu Divorce Act 1952, 279
 - special provisions as to pending cases, 94
 - viculo matrimonii*, 10
 - Domiciled, 23-24, 26
 - constituent elements, two, 23
 - Dowry, 119, 120
 - Drunkenness, 117
 - Dwelling houses
 - special provisions respecting, 449-54
 - wholly occupied by members of his other family, 449-50, 452-53
- E**
- English (England) law, 12-13, 82
 - courts of, 12-13, 17, 82
 - decision of courts, 12-13, 17
 - enactments (Acts), 12-13, 17
 - English Matrimonial Causes Acts (*see* Matrimonial)
 - Estate Duty Act (1953), 314
 - Evidence
 - documentary, 198
 - Evidence Act, 147, 270
 - Ex majore cautela*, 276
 - Exogamy, 39, 50
- F**
- Factum valet
 - doctrine of, 56

Family

- Family Law Reforms Act 1969, 89, 100
- joint, 281–83, 301, 308–18, 461–68
 - business continued after death of coparcener, 322
 - partition between members of, 323–24
- Father, 487, 537, 547, 549 (*see also* Adoption; Heirs)
 - power of adoption vests in, 549
 - step-father, 490
- Father-in-law, 421–28
- Female intestate, childless
 - property inherited from father, mother, husband and father-in-law, 421–28
 - succession in case of, 432–39
- Force, consent by, 85–87
- Foreigner, 24
- Forgiveness, 218–19
- Fraud, 85–87
 - condonation to, 87
 - consent by, 85–87
- Full blood (*see* Relationship)

G

- General Clauses Act 1897, 279, 299, 453
- Gorkhas (Gorkha tribe), 24
- Guardian (s) (Guardianship), 473–509, 523
 - de facto*, 504–07
 - abrogated powers of, 478
 - definition, 482–83
 - disqualifications, 489–90
 - father as natural, 487–89
 - Guardians and Wards Act 1890, 473–78, 479, 480, 481, 484, 486, 488, 492, 497, 498, 500, 503, 504
 - Hindu Minority and Guardianship Act (1956), 240, 265, 479–509, 513, 523
 - application of, 481–82
 - de facto* guardian not to deal with minor's property, 504–07
 - definitions, 482–83

- effect of, 483–84
- father-mother custody, 487–89
- husband lawful of his minor wife, 489
- incapacity of minor to act as guardian of property, 503–04
- mother lawful of her illegitimate children, 489
- natural guardians of minor, 484–90
- not to be appointed for minor's undivided interest in joint family property, 507–08
- persons governed by, 482
- proceedings, 490
- step father, step mother, 490
- supplemental to Guardians and Wards Act, 476, 480
- testamentary and their powers, 477–78, 499–503
- welfare of minor to be paramount consideration, 478, 508
- in marriage, 51–53
 - marriage without consent of guardian, 53
 - persons as guardian, 53
- minor, 50–51, 478, 482, 484–90, 493–94, 503–04, 508–09
 - welfare of, 478, 508,
- natural, 474–75, 477–78, 482, 485–86
 - limitation of powers of, 495–97
 - of adopted daughter, 491
 - of adopted son, 490
 - of minor, 484–90
 - powers of, 477–78, 491–93
 - restrictions imposed on powers of, 477–78
 - rights of, 474–75
- of bride, 48, 50–51
- of minor bride, consent of, 50–51
- of minor's undivided coparcenary interest, 507–08
- powers of, 499–503

testamentary, 475-76, 477-78,
499-503
powers of, 477-78, 499-503
restrictions imposed on
powers of, 477-78

H

Half blood (*see* Relationship)

Heirs (Heirship), 331-53, 451-56

brother, 331, 348, 349, 353, 471
brother's daughter, 331, 351, 471
brother's son, 331, 351, 471
brother's widow, 331, 352, 471
half brother, 353
illegitimate brothers, 420-21
uterine brothers, 353, 420
categories, four, 332-34
class I of Schedule, 331, 451-52,
471
class II of Schedule, 331-32, 471
computation of degrees, 332
daughter, 331, 337, 344-45, 347,
411, 413, 471
adopted, 344-45, 413
born of void and voidable
marriage, 345
having physical or mental
defect, 345
daughter of predeceased
daughter, 331, 347, 411,
414, 471
daughter of predeceased
son, 331, 347, 411, 414,
471
daughter of predeceased son
of predeceased son, 331,
347, 471
daughter's daughter's
daughter, 331, 350, 471
daughter's daughter's son,
331, 350, 471
daughter's son's daughter,
331, 350, 471
daughter's son's son, 331,
350, 471
illegitimate daughter, 345
posthumous daughter, 345
step-daughter, 413

degrees of ascent and degrees
of descent, 332
diseases, defect etc not to
disqualify, 460
disqualified, 289-90, 455-60
distribution of property among
class I of Schedule, 331,
451-52, 471
distribution of property among
class II of Schedule, 331-32,
471
failure of, 460-61
father, 331, 348, 352, 353, 418, 419,
421-26, 471
father's brother, 331, 352,
353, 471
father's father, 331, 352, 471
father's mother, 331, 352,
353, 471
father's sister, 331, 352, 353,
471
father's widow, 331, 352, 471
heirs of, 419
full blood, 439-42
half blood, 439-42
in class I and class II of
Schedule, 331-32, 451-52, 471
law of, 278-79, 281-82
mode of succession of two or
more, 442-43
mother, 331, 345-46, 418, 421-26,
471
adoptive, 346
heirs of, 420
mother's brother, 331, 353, 471
mother's father, 331, 353, 471
mother's mother, 331, 353, 471
mother's sister, 331, 353, 471
step mother, 346
murderer disqualified, 456-58
of husband, 411, 414-16, 421-30
order of succession among
heirs, 330-57
order of succession and manner
of distribution among heirs of
female, 429-31
sister, 331, 348, 349-50, 353, 471
full-sister, 350

- half-sister, 350
- illegitimate sister, 420–21
- sister's daughter, 331, 351, 471
- sister's son, 331, 351, 471
- uterine sister, 353, 420
- son, 331, 337–42, 347, 411–13, 471
 - adopted son, 337–38, 413
 - character and nature of
 - interest of, 340–42
 - divided, 338
 - illegitimate son, 339–46
 - posthumous son, 338
 - son born after partition, 338
 - son born of void or
 - voidable marriage, 339
 - son having physical or
 - mental defects, 340
 - son of predeceased
 - daughter, 331, 346–47, 350, 411, 414
 - son of predeceased son,
 - 331, 340–42, 411, 413–14
 - son of predeceased son of
 - predeceased son, 331, 342, 471
 - son's daughter's daughter,
 - 331, 348, 349, 471
 - son's daughter's son, 331,
 - 348, 471
 - step-son, 339–40, 346
- surrender of estate by widow or
 - other limited heir, 394–95
- widow, 331, 342–44, 347, 471
 - of predeceased son, 331,
 - 343, 455, 471
 - of predeceased son of
 - predeceased son, 331, 340, 471
- High Court rules, procedure regulated
 - by, 189–90
- Hindu, word meaning of, 25–26
- Hindu Adoptions and Maintenance
 - Act 1956 (*see* Adoption; Maintenance)
- Hindu Adoptions and
 - Maintenance Act 1959 (*see* Adoption ; Maintenance)
- Hindu Disposition of Property Act
 - 1916, 597–98 (*see also* Property)
- Hindu family
 - joint family, 281–83, 301, 308–18, 461–68
 - concept of, 281
 - Kerala Joint Hindu Family
 - System (Adoption) Act, 301–334
 - undivided, 281–303
- Hindu Gains of Learning Act 1930,
 - 604
 - definitions, 604
 - gains of learning, 605
 - learning, 605
 - savings, 605
- Hindu Inheritance (Removal of
 - Disabilities) Act 1928, 289, 460, 599–600 (*see also* Inheritance)
- Hindu law, 1–3, 25, 39
 - codification, 203, 523
 - Hindu Code Bill, 45
 - Hindu Law Committee, 3, 299
- Hindu Marriage (Marriage)
 - Hindu Marriage Act 1955 (*see* Marriage)
 - Hindu Marriage Act 1964 (*see* Marriage)
 - Hindu Marriage Amendment Act
 - 1964, 53
 - Hindu Marriage and Divorce Bill,
 - 31
 - Hindu Marriage Bill, 25
 - Hindu Marriage Disabilities
 - Removal Act 1946 (*see* Marriage)
 - Hindu Marriage (Punjab) Rules
 - 1956 (*see* Marriage; Punjab)
 - Hindu Marriages validity Act
 - 1949 (*see* Marriage)
 - Hindu Married Women's Right to
 - Separate Residence and
 - Maintenance Act 1946 (*see* Maintenance; Marriage; Women)
- Hindu Minority and Guardianship
 - Act 1956 (*see* Guardianship)
- Hindu religion, 1, 24–27
- Hindu Succession Act 1956
 - (*see* Succession)

- Hindu Succession (Andhra Pradesh Amendment) Act 1986, 462, 463 (*see also* Succession)
- Hindu Succession (Karnataka Amendment) Act 1990, 309 (*see also* Succession)
- Hindu Succession (Maharashtra Amendment) Act 1994, 466–68 (*see also* Succession)
- Hindu Succession (Tamilnadu Amendment) Act 1989, 464, 465 (*see also* Succession)
- Hindu Widow's Remarriage Act (1856), 342–43, 396 (*see also* Widow)
- Hindu Women's Rights to Property Act 1937 (*see* Property)
- Hinduism, 27, 45, 283, 290, 294, 304, 575, 591
- Hindus
 - division of castes, 12, 43–44
 - domiciled, 23–24
 - mixed races, 2
- Husband
 - entitlement to succeed, 414–16, 421–30
 - guilty of rape, sodomy or bestiality, 10, 71, 91, 155
 - having another wife, 569–73
 - having more than one wife, 71, 154–55
 - remarriage of, 134–35
 - rights of, 66–67
- I**
- Ill-treatment (*see also* Cruelty)
 - mental, 109–10
 - physical, 109–10
- Impotence, 78–83
 - delay and proceeding for nullity of marriage on grounds of, 226
- In camera
 - hearing, 199
 - proceeding, 198–99
- Indian Divorce Act 1869 (*see* Divorce)
- Indian Majority Act (1875), 473 (*see also* Majority)
- Indian Penal Code, 12, 27, 47, 57, 58, 118, 156, 179–80, 181
- Indian Succession Act 1925 (*see* Succession)
- Inheritance, 274–75, 281–90, 599–600
 - Hindu Inheritances (Removal of Disabilities) Act 1928, 289, 460, 599–600
 - never in abeyance, 305
 - Punjab customs (customary law), 300–302, 469
 - rules of, 292
 - scheme, 284
- Insanity, 48, 121
- Insincerity, doctrines of, 83
- Intestate succession, 291–471 (*see also* Succession: Hindu Succession Act 1956)
- J**
- Jainism, 283, 290, 591
 - Jains, 4, 12, 24, 25, 26–27, 44, 141, 146, 283, 293, 294, 481, 512, 525, 543
- Jaipur Hindu Women's Right to Property Act (1947), 470
- Jammu and Kashmir Hindu Succession Act 1956, 293
- Jews, 4, 24, 26, 283, 293
- Judgment
 - by admissions, 206
 - in rem, 270
- Judicial Proceedings (Regulation of Reports) Act 1926, 220
- Judicial separation (*see* Separation)
- K**
- Kerala Joint Hindu Family System (Abolition) Act, 301, 334
- L**
- Land
 - agricultural, 302–03
 - Delhi Land Reforms Act, 303
 - Land Acquisition Act, 389
 - policy, 302–03
 - UP Zamindari Abolition and Land Reforms Act, 380

Learning, gains of, 604–05
 Legitimacy (legitimate kinship), 348–50
 marriage and, 55–56
 Leprosy, 9, 71, 90, 92, 145, 569 (*see also* Diseases)
 Limitation, 270, 273–74, 507
 Limitation Act, 270, 273–74, 507
 Lingayats, 4, 25, 294
 Lunacy Act, 142

M

Madras

Madras Act 21 of 1967, 56–57
 Madras Aliyasanthana Act 9 of 1949, 278, 295, 300, 328, 469
 Madras Aliyasantana (Mysore Amendment) Act 1 of 1962, 328
 Madras Hindu (Bigamy Preventions and Divorce) Act 1949 (VI of 1949), 279
 Madras Namudri Act 1932 (Madras Act xxi of 1933), 296
 Madras Marumakkathayam Act 1932 (Madras Act xxii of 1933), 278, 296

Maharashtra Amendment Act of 1994, 466–688

Maintenance, 240–60, 511–95
 amount of, 586–93
 amount may be altered on change of circumstances, 591–93
 agreement not to sue for, 262
 application for at the time of passing decree, 249–53
 application made by either wife or husband, 253
 arrears of, 591
 assessment of quantum, 257–60, 587–91
 assessment of quantum payable, 587–91
 claimant living separately, 590
 claimant's own earnings, 590
 claimant should be Hindu, 591
 court, discretion of, 254–56, 521–22

debts have priority, 593
 discretion of court, 254–56, 521–22
 effect of transfer of property on right to, 594–95
 gross sum or monthly or periodical payments, 256
 Hindu Adoptions and Maintenance Act 1956 (*see* Adoption)
 Hindu Adoptions and Maintenance Act 1959, (*see* Adoption)
 Hindu Married Women's Right to Separate Residence and Maintenance Act 1946, 519, 567
 interim, 232–40, 578, 580
 flouting order of, 240
 for children, 240–41
 quantum of, 236–37
 of aged parents, 520, 578–80
 of children, 520, 578–80
 of dependents, 512, 582–84
 of deceased, 520–21
 of widowed daughter-in-law, 575–78
 of wife, 519
 order can be made in favour of unsuccessful spouse, 253–54
 pendente lite, 270
 and expenses of proceedings, 230–42
 persons entitled to as dependants, 520–21
 property given in lieu of, 401–06
 rules, 522
 scheme of, 518–19
 variation of order or agreement fixing maintenance, 262–63, 592–93
 when to be a charge, 593–94
 Majority
 Indian Majority Act 1875, 473
 Malabar law, 329
 Males (*see also* Succession)
 property of, 331–32, 333–34

- rules of succession in case of, 330-57, 432-33
- succession to property of male during intestate, 330-57, 432-33
- Manu, 1
- Marriage(s), 1-14, 42-49
 - Asura* unapproved form, 2
 - bigamous (bigamy), 12, 155, 279
 - Bombay Prevention of Hindu Bigamous Marriages Act 1946, 279
 - Madras Hindu (Bigamy Prevention and Divorce) Act 1949, 279
 - Saurashtra Prevention of Hindu Bigamous Marriages Act 1950, 279
 - Brahma* approved form, 2
 - ceremonial, 2, 5, 6, 53-58
 - ceremonies, 2, 5, 53-55
 - changes in law of, 11-12
 - child marriage (*see* Children)
 - Child Marriage Restraint Act 1929, 182, 601-03 (*see also* Children)
 - Child Marriage Restraint Amendment 1978, 43, 50-52, 62, 76, 77, 87
 - civil, 5, 57-58
 - codification need for, 2-3, 15-17
 - collusion, standard of, 222-23
 - conception of, 6-7, 44-45
 - conditions for, 5-6, 42-51
 - consummate (consummation), 79-83
 - court under, duty of, 13-14
 - customery rites, 6
 - denial of, 332
 - dissolution of, 4, 9-14, 156-58
 - forms, four approved, 2
 - forms, four unapproved, 2
 - forms of, eight, 2-3
 - guardian in, 77
 - Hindu Inheritance (Removal of Disabilities) Act 1928, 289, 407
 - Hindu Marriage Act 1955, 4, 9, 15-290, 313, 339, 343, 345-46, 348, 444, 480, 482, 413, 520, 523, 525, 526, 527, 529, 546, 552, 556, 557, 569, 570, 571-72, 574
 - amendments, 43, 51-52, 176-77, 182
 - application, 24-28, 189
 - changes in law by, 11
 - conception of, 44-45
 - conduct of parties, 261-62
 - definitions, 28-39
 - effect of, 4, 39-42
 - insincerity, doctrine of, 83
 - jurisdiction, 182-275
 - not retrospective in operation, 41-47
 - persons governed by, 25
 - proceedings, decree in, 198-228
 - procedure, 182-275
 - provisions, 192-93
 - reconciliation provisions, 227-28
 - rules of interpretation of statutes, 17-21
 - savings and repeals, 275-79
 - scheme of, 11
 - Hindu Marriage Amendment Act 44 of 1964, 93
 - Hindu Marriage and Divorce Bill, 31
 - Hindu Marriage Bill, 25
 - Hindu Marriage Disabilities Removal Act 1946, 50, 276, 279
 - Hindu Marriage (Punjab) Rules 1956, 104
 - Hindu Marriage Register, 57, 58, 188
 - Hindu Marriages Validity Act 1949, 276, 279
 - Hindu Married Women's Right to Separate Residence and Maintenance Act 1946, 519, 567
 - Hindu Widows Remarriage Act 1856, 342-43, 396
 - ipso jure*, 7-8, 12, 72-74, 75, 77
 - inter-marriage, 12
 - irretrievable breakdown of, 14

- invalidation of, decree of, 48–50
- invalidly of, 48–50, 81
- kanyadaan*, 55
- law of reform, 1–3
- legitimacy and, 55–56
- Marriage laws (Amendment) Act of
 - 1976, 5, 9, 10, 43, 59, 68–69, 76, 77, 78, 84, 86, 92–93, 94, 97, 123, 156, 159, 160, 163, 165, 173, 174, 176, 197, 198, 199, 201, 202, 229, 257, 271, 273, 275
 - monogamous, 12
- matrimonial causes (*see* Matrimonial Causes)
- non-registration, consequences of, 58
- nullity of, 5, 7, 8–9, 72–182
 - decree of, 7, 9–10, 49–50, 74–76, 339
 - reliefs by way of, 11
 - remarriage before disposal of appeal against decree of, 76–89
- penalty for failure to register, 58
- petition for dissolution of, 90
- punishment for contravention of certain conditions for, 181–82
- Rau Committee, 3, 299
- register, 57, 58, 188
- registration of, 5, 31, 57–59
- reliefs, 7
 - legal ground why should not be granted, 227
- remarriage, 76, 289, 342–43, 396, 416–17, 454–56, 584–85
 - after decree for dissolution of marriage, 155, 169
 - before disposal of appeal against decree of nullity, 76, 89
 - Hindu Widow's Remarriage Act 1856, 342–43, 345, 396 (*see also* Widow)
 - of husband, 134–35
- sacramental, 45
- solemnisation of Hindu marriage, 45–46, 179–81
- Special Marriage Act 1954, 4, 5, 18, 41, 44, 57, 82, 160, 193, 209, 210, 245, 276, 279, 302, 306
- valid (validity of), 5–6, 8, 31–32, 38–39, 48–50, 53, 56–57, 72–74, 77, 173–79, 276–77
 - conditions for, 5–6, 12
 - requirements of, 6, 12
- void; 7–8, 8–9, 31, 72–76, 77, 173–79, 339
 - ab initio*, 9
 - ipso jure*, 7–8, 12, 72–74, 75, 77
- voidable, 7, 8–9, 12, 76–89, 173–79, 339, 345, 348
- Marumakkattayam* law, 283, 284, 291, 296, 297, 302, 305, 324, 325, 326, 327, 355, 408, 427, 432–39, 469
 - special provision respecting persons governed by, 432–39
- Matrimonial causes (law), 59–72 (*passim*)
 - costs in, 196
 - general rule of, 47
 - legislation, 92–93
 - Matrimonial Causes Act 1857, 10
 - Matrimonial Causes Act 1884, 66
 - Matrimonial Causes Act of 1937, 82
 - Matrimonial Causes Act of 1950, 12, 13, 17, 82, 104, 193, 224, 245, 260, 265
 - Matrimonial Causes Act 1973, 13, 17, 82, 228
 - offences, 11, 216–21
 - knowledge of, 217
 - revival of, 219–21
 - reliefs in, 7, 11
 - sexual intercourse, continuance or resumption of, 217–18 (*see also* Sexual)
- Mayukha* law, 348
- Mind (Mental)
 - capacity, 6, 48
 - cruelty (*see* Cruelty)
 - defect, 340, 345
 - disorder, 9, 42, 48, 71, 84, 90, 141, 143–44

- infliction, 48
 Mental Health Act 1959, 144
 unsoundness (unsound mind), 6,
 42, 48, 71, 84, 90, 141-43
 Minor(s), 482, 484-90, 527, 601
 acquisition of property for, 494
 children (*see also* Children),
 484-90
 consent of guardian of
 minor bride, 50-51
 de facto guardian not to deal
 with property of, 504-06
 estate of, 493-94
 guardian of, 484-90 (*see also*
 Guardian)
 incapacity of to act as guardian
 of, property, 503-04 (*see also*
 Guardian)
 welfare of, 478, 508-09
 Minority
 Hindu Minority and
 Guardianship Act 1956 (*see*
 Guardianship)
 Mitakshara law (school) (family), 282,
 285, 288, 290, 291, 302, 308,
 310-12, 314-16, 320, 338, 343, 356-
 57, 381-82, 432, 461-62, 464, 466,
 467, 468, 469, 470, 520, 552, 576
 Monogamy (Monogamous marriage),
 2, 3, 6, 7, 11, 12, 46-47, 72, 154,
 179, 279
 Mother, 539-40 (*see also* Adoption;
 Heirs)
 minor in custody, 487-89
 power of adoption vests in, 549
 step-mother, 490
 Muslims, 4, 24, 26, 283, 293
 Mysore
 Mysore Act of 10 of 1933, 381
 Mysore Hindu Women's Rights
 Act, 317
N
Naikins (dancing women), 298-99
 children of, 298-99
 Nambudri law, 283, 284, 286, 297,
 324, 325, 327, 432, 469
 Cochin Nambudri Act, 296
 Madras Nambudri Act 1932, 296
 Native Convert's Marriage Dissolution
 Act 1866, 140 (*see also*
 Conversion)
O
 Ownership
 full owner, 395-96
P
 Parents, aged
 maintenance of, 520, 578-81
 (*see also* Maintenance)
 Parsis, 4, 24, 26, 283, 293
 Partition between coparceners
 (*see* Coparcenary)
Patria potestas, principle of, 281
 Personal covenant, 494-95
 Petition(s), 273
 convents and verification of,
 188-89
 court to which be presented,
 182-87
 pending, 69
 power of transfer in certain
 cases, 197-98
 special provision relating to trial
 and disposal of, 198
 statements that may be referred
 to as evidence, 189
 Physical defect, 340, 345
 Polyandry, 2-3
 Polygamy, 154
Prarthana, 24, 293
 Privy Council judicial committee, 16,
 25
 Proceedings
 decrees in, 200-298
 delay in, 83, 223-26
 for nullity on ground of
 impotence (*see also*
 Marriage), 226
 expenses of, 230-42
 in camera and may not be
 provided or published,
 198-200
 nature of, 490
 pending, 67-68, 69

- relief for respondent in divorce
and, 229 (*see also* Divorce)
- restriction on publication and
newspaper reports, 199–200
- stay of, 191
if necessary, 242
substantive, 191–92
- prohibited degrees of marriage, 38–39
(*see also* Marriage)
- prohibited relationship, decrees of
(*see also* Relationship)
- proof, standard of (corroboration),
203–06
- property, 330–57, 406–29 (*see also*
Succession)
acquired, 382, 398–401
alienation of made by female,
383–86
ancestral, 284
Benami Transactions
(Prohibition) Act 1988, 607–09
definitions, 607
not to apply in certain
cases, 608
power to make rules, 609
prohibition of benami
transactions, 607–08
prohibition of right to
recover property held
benami, 608
property held *benami* liable
to acquisition, 608
repeal and saving, 609
repeal of provisions of
certain Acts, 608
Benami Transactions Prohibition
of the Right to Recover
Property Ordinance 1988,
607–09
de facto guardian not to deal
with minor's property, 504–07
devolution of, 324–30
devolution of interest of *tarwad*,
tavazhi, *kutumba*, *kavaru* or
illom, 324–30
devolution of *sthanam*, 329–30
disposal of 266–69
given in lieu of maintenance,
401–06
guardian of minor's undivided
coparcenary interest, 507–08
Hindu Disposition of Property
Act 1916, 597–98
Hindu Women's Rights to Property
Act 1937, 282, 285, 288, 311, 333,
381, 388, 396, 399, 401, 405, 520,
556, 576–77, 606
illom, 324–30
incapacity of minor to act as
guardian of, 503–04
Jaipur Hindu Women's Right to
Property Act 1947, 470
joint family property, 281, 322,
338, 487
Kavaru, 324–30
Kutumba, 324–30
Law of Property Act 1925, 445
of female to be absolute heir of
property, 286, 377–406, 410
of male, 334
order of succession, 410–21
parties to suit relating to any
property affected by proviso, 412
possessed by female, 383
possessed, meaning of, 386–91
preferential right to acquire in
certain cases, 446–49
appeal, 449
limitation, 448
pre-emption, 446–48
suit, 448
restricted estate, 397–98, 406
reversions, 391–94
suit by remote reversioner,
393–94
stridhana, 268, 282, 286, 377,
378, 397, 408 (*see also*
Women)
succession to property of female
dying intestate, 407–08
tarwad, 324–30
tavazhi, 324–30
transfer of cases, 158
Transfer of Property Act 1882,
262, 397, 579, 594–95, 597
Transfer of Property
(Amendment) Supplementary
Act 1929, 598

women, status of in matters of, 282
 Psychopathic disorder, 90
 Punjab
 Hindu Marriage (Punjab) Rules
 1956, 104
 inheritance custom, 301
 Punjab agricultural custom,
 300-01
 Punjab Courts Act, 273
 Punjab customary law, 300-02, 469
 Punjab Debtor's Protection Act, 301

R

Rape, 10, 71, 91, 155
 Rau Committee, 3, 299
 Relationship, 30-39, 49-50
 by adoption, 38-39, 49-50, 298,
 313-14, 335-37, 347-55, 411-21
 by blood (*see below* full-blood,
 half-blood)
 degrees of prohibited, 8, 38-39,
 49-50, 72
 full-blood, 28, 30-31, 295, 298, 335,
 347-55, 439-42
 half-blood, 28, 29, 30-31, 295, 298,
 335, 347-55, 439-42
 illegitimate blood, 29, 37, 38, 296,
 298, 351
 legitimate blood, 29, 37, 38, 296,
 298, 335, 351
 sapinda, 6, 7, 31-38, 39, 50, 285,
 552
 uterine blood, 28, 29, 30-31, 295,
 298, 353
 Religious Orders
 adoption of, 146-47
 Repeals, 279, 595
 Repealing and Amending Act
 1960, 279
 Res judicata, doctrine of, 194-96
 Reside (resided) (residence), 184-86
 Reversioners
 suit by remote, 393-94
Rig Veda, 1

S

Saurashtra
 Saurashtra Hindu Divorce Act
 1952, 279

Saurashtra Prevention of Hindu
 Bigamous Marriages Act 1950,
 279
 Savings, 275-79, 596
 Schedule tribes, 27
 Constitution (Schedule Tribes)
 Orders 1950, 27
 Constitution (Schedule Tribes)
 Orders 1951, 27
 Separation, judicial (*see also* Divorce),
 7, 10-11, 15, 68-73, 123-40, 146
 adultery ground for, 102
 consensual, 127-2
 decree, consent, 72
 decree for, 10
 distinction between divorce and,
 11
 good cause for, 133-34
 remarriage of husband,
 134-35
 wife driven out, 135
 grounds for, 93-94, 144
 instead of divorce, 159
 mutual consent, 66-67
 no resumption of cohabitation
 for one year or more after
 decree of, 148-50
 petition for, 70
 provisions, amended and
 unamended, 71
 reliefs by way of, 12
 rescission of decree, 72
 Sexual
 intercourse, continuance or
 resumption of, 217-18
 malpractices, 116
 perversity, 119
 relations, 119
 Sikhism, 283, 290, 591
 Sikhs, 4, 12, 24, 25, 26-27, 44, 141,
 146, 283, 293, 294, 481, 512, 525,
 543
 Sikh Jats, 277
 Sodomy, 10, 71, 91, 195
 Son (*see also* Adoption; Heirs), 312-18,
 411-13, 545-46
 adopted son, 412, 539
 adopted son, natural
 guardianship, 490-91

- father, mother, court may give in
 - adoption, 538-34
 - of predeceased daughter, 411
 - of predeceased son, 411
 - step-son, 412
- Specific Relief Act 1963, 74
- Spouses
 - correspondence between, 65
- Statutes, principal rules to
 - interpretation of, 17-21
 - legislature, intention of, 18
 - literal construction, rule of 19-21
- Stridhana* (see Property; Women)
- Succession (see also Heirs)
 - Andhra- Pradesh Amendment 1985 (AP Act 13 of 1986), 461-63
 - convert's descendants
 - disqualified, 458-59
 - Hindu Succession Act 1956, 31, 158, 178, 245, 283, 291-478, 493, 512, 513, 514, 523, 526, 550, 554, 556, 557, 558, 560, 576, 577
 - agnates, 295, 297, 353-55, 365-76
 - application, 293-94
 - childless female intestate
 - inherited property from father or mother, 421-26
 - child less female intestate
 - inherited property from husband or father-in-law, 426-28
 - codifying, 292
 - cognates, 295, 297, 355-57, 365-76
 - definitions, 295-97
 - degrees, computation of, 365-76
 - devolution of interest in
 - coparcenary property, 308-24
 - distribution of property
 - among heirs in class 1 of Schedule, 359-63
 - distribution of property among heirs in class II of Schedule, 363-65
 - effect of, 299-304
 - escheat, 460-61
 - extent and commencement, 293
 - interpretations, 295-99
 - intestate, 304-463
 - order of succession, 337-463
 - among agnates and cognates, 353-56, 365-76
 - among heirs, 357-59
 - and manner of distribution among heirs of female, 429-31
 - to property of child less female intestate, 421-28
 - persons governed by, 294
 - properties not to apply to certain, 306-07
 - property of female to be her absolute property, 377-406
 - rules of succession in case of female, 406-29
 - rules of succession in case of males, 330-57
 - scheme of, 284
 - special provisions respecting persons governed by *marumakkattayam* and *aliyasantana* laws, 432-39
 - testamentary succession, 291, 468-70
 - title, 292-93
 - Hindu Succession (Karnataka Amendment) Act 1990, 309
 - Hindu Succession (Tamilnadu Amendment) Act 1989, 464, 465
 - in case of female intestate, 432, 435-37
 - in case of male intestate, 432-35
 - Indian Succession Act 1925, 288, 306, 468, 598
 - intestate, 304-463
 - Jammu and Kashmir Hindu Succession Act 1956, 293
 - law of, 281-84

Maharashtra Amendment Act
1994, 466-68
mode of two or more heirs,
442-43
murderer disqualified, 456-58
order and manner of distribution
among heirs, 304-468
property inherited by childless
female intestate from her
father, mother, husband and
father-in-law, 421-29
provision relating to, 304-468
related, definition of, 296-97
rules, general, 288-89
rules of in case of males, 330-57
spes sucessionis, 305
Tamil Nadu Amendment Act of
1990, 464-66
testamentary, 291, 468-70
to property of female intestate,
286-87
to property of male dying
intestate, 331
to property of male intestate,
285-86
uniform law of, 283-84
when heirs disqualified, 454-60
women treated in *equali jura*, 514
Survivorship, 309, 312-18, 320-21,
328, 462-63
coparceners, 314-18

T

Tamil Nadu
Hindu Succession (Tamilnadu
Amendment) Act 1989, 464, 465
Tamilnadu Amendment Act of
1940, 464-66
Tamilnadu Amendment Act of
1990, 464-66
Tenancy, 303
rights, 303, 333
tenants-in-common, 443
Transfer of Property Act (*see*
Property)
Travancore
Travancore *Ezhava* Act (111 of
1100), 296

Travancore *Krishnanvaka*
Marumakkathayee Act (VII of
1115), 296
Travancore Kshatriya Act (VII of
1108), 296, 327
Travancore Malayala Brahmin
Act (III of 1106), 296
Travancore *Nanjinad Vellala* Act
(VI of 1108), 296
Tavancore *Nayar* Act (II of
1100), 278, 296, 301

U

Unsound mind (Unsoundness), 6, 9,
42, 71, 84, 90, 141-43, 144, 298
Uterine blood (*see* Relationship)
Uttar Pradesh (UP)
Uttar Pradesh Act 1962, 93
UP Zamindari Abolition and Law
Reforms Act, 380

V

Virashaiva, 24, 293
Widow (*see* Women)
Wife (*see* Women)
Women (Females)
female intestate who had
remarried, 416-17
Hindu Married Women's Right to
Separate residence and
Maintenance Act 1946, 519, 567
Hindu Women's Rights to
Property Act (*see* Property)
Jaipur Hindu Women's Right to
Property Act 1947, 470
Mysore Hindu Women's Right
Act, 317
niakins (dancing women), 289-99
children of, 298-99
property of female to be her
absolute property, 286
rules of succession in case of,
406-29
status of in matters of property,
282
stridhana (women's property),
268, 282, 286, 377, 378, 397,
408 (*see also* Property)

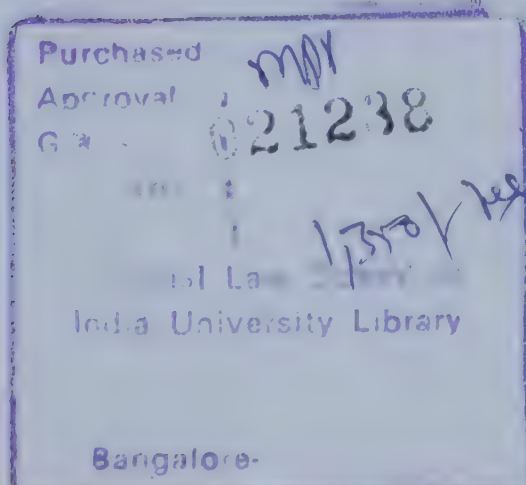
succession to property of female
 dying intestate, 407-08
 succession to property of female
 intestate, 286-87
suppressio veri (women pregnant
 at time of marriage), 77-78
 treated as in, 514
 widow, 342-44
 adoption by, 536-37, 551-52
 conversion of, 343
 co-widows, 380-82
 dependants of widowed
 daughter of deceased,
 582
 Hindu Widow's Remarriage
 Act 1856, 342-43, 345, 396
 interest of, 319-20
 Maintenance of widowed
 daughter-in-law, 575-78
 of deceased coparcener,
 585
 of predeceased son, 343
 of predeceased son of
 predeceased son, 344
 reconveyance property to,
 392
 related to intestate as widow
 of predeceased son, 455
 remarriage of, 293, 342-43,
 396, 454-56, 584-85
 rights of, 308-09
 surrender of estate by or
 other limited heir, 394-95

wife
 consent of, in adoption,
 534-35
 driven out, 135
 heirs of husband on death,
 428-29
 maintenance of, 519, 564-75
 ceased to be Hindu by
 conversion, 573-74
 cruelty, 568-69
 desertion, 567-68
 husband having another
 wife, 569-73
 interim, 578, 580
 keeping concubine, 573
 leprosy, 569
 past maintenance, 574
 right to separate
 residence and
 maintenance, 519, 567
 unchaste wife, 575
 pregnant at time of
 marriage, 87-88
 sue for divorce, right of,
 158 (*see also* Divorce)
 when entitled to separate
 residence and
 maintenance, 519, 567

Z

Zamindari

UP Zamindari Abolition and
 Land Reforms Act, 380





**NATIONAL LAW SCHOOL OF INDIA
UNIVERSITY LIBRARY**

NAGARBHAVI, BANGALORE - 560 072.

This book must be returned by the date stamped below

~~525~~ ~~2/9/09~~	~~5/11/11~~ ~~Anaya~~
~~6/12~~	
~~For Exam~~	
~~11/12/11~~	
~~F-2010/13~~	
~~20/04/13~~	
~~Exam~~	

~~2/11/11~~

P.T.O.

340-58

Cl. No

MUL-II

Author.....

MUL-II

340-58

MUL-II

021238

ISBN 81-8038-111-0

Rs. 1350/-